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REPORTS
OF CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
WESTERN DIVISION,
April Terms, 1893 and 1894;
FOR THE
EASTERN DIVISION,
September Terms, 1893 and 1894;
AND FOR THE
MIDDLE DIVISION,
December Term, 1893.

GEORGE W. PICKLE,
ATTORNEY-GENERAL AND REPORTER.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
WESTERN DIVISION.

JACKSON, APRIL TERM, 1893.

BOYD *v.* ROBINSON.

(Jackson. June 1, 1893.)

1. WILLS. *Construction of.*

A testator devised his real estate absolutely to two sons, providing, in the same clause, that if either should die intestate, and without children born in lawful wedlock, his share should go to the survivor, and, in the next succeeding clause, that if both sons should die without children, the whole estate should go to a daughter.

Held: The daughter takes only in the contingency that both sons die without children *and* intestate. (*Post*, *pf.* 4, 5, 29-33.)

2. SAME. *Same.*

A testator, having only one brother and one sister surviving, bequeathed his entire estate to the brother "and his lawful heirs," and in the event of the brother's death without "such heirs," then to the sister. Testator had no children, and his brother and sister would have been his heirs.

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Held: The bequest to the sister is valid. The phrase "lawful heirs" means in this will "children." And hence it is neither a perpetuity, nor an estate tail which would by our statute be converted into an estate in fee. (*Post*, pp. 5, 6, 33-40.)

Code construed: §§ 2813, 2814, 2815 (M. & V.); §§ 2007, 2008, 2009 (T. & S.).

Cases cited and approved: *Armstrong v. Douglass*, 89 Tenn., 223; *Franklin v. Franklin*, 91 Tenn., 123; *Cowan v. Wells*, 5 Lea, 682; *Petty v. Moore*, 5 Sneed, 126; *Bramlett v. Bates*, 1 Sneed, 555.

Cited and distinguished: *Middleton v. Smith*, 1 Cold., 144; *Kirk v. Ferguson*, 6 Cold., 484, 485; *Skillin v. Lloyd*, 6 Cold., 563; *Wynne v. Wynne*, 9 Heis., 308; *Grimes v. Orrand*, 2 Heis., 298, 300; *Read v. Fife*, 8 Hum., 328; *Polk v. Faris*, 9 Yer., 234; *Turley v. Massengill*, 7 Lea, 356; *Hooberry v. Harding*, 3 Tenn. Ch., 677.

3. FAMILY SETTLEMENTS. *Sustained in Courts of Equity, when.*

Family settlements will be sustained in Courts of Equity, unless it clearly appears that there is manifest error, and, even in cases of persons under a disability, will not be disturbed after a long lapse of time, and the accrual of other rights thereon. (*Post*, pp. 6, 11, 26, 27.)

Cases cited and approved: *Summers v. Wilson*, 2 Cold., 469; *Williams v. Sneed*, 3 Cold., 533; *Farnsworth v. Dinsmore*, 2 Swan, 38; *Owen v. Hancock*, 1 Head, 563; *Reynolds v. Brandon*, 3 Heis., 593; *Andrews v. Andrews*, 7 Heis., 235; *Darden v. Harrell*, 10 Lea, 421.

4. RES ADJUDICATA. *Extent of.*

The plea of *res adjudicata* covers, except in special cases, not only the points upon which the Court was required by the parties to form an opinion and pronounce judgment, but every point which properly belongs to the subject of litigation, and which the parties, by the exercise of reasonable diligence, might have brought forward at the time. (*Post*, pp. 19, 20, 27, 28.)

Cases cited and approved: *Nicholson v. Patterson*, 6 Hum., 394; *Thompson v. Blanchard*, 2 Lea, 528; *Parks v. Clift*, 9 Lea, 524; 7 Wall., 623; 53 Am. Dec., 325.

5. SAME. *Same. Pleadings.*

Where lands have been sold for the ancestor's debts by judicial proceedings to which the heir was a party, the latter will be precluded from setting up title in himself, upon the ground that the ancestor held the lands under a deed that gave him only a life-estate, with remainder to the heir. In such case the construction of the deed is

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necessarily involved, and; whether correctly or incorrectly done, becomes *res adjudicata*. (*Post*, pp. 21-25.)

Cases cited and approved: *Shepherd v. Shepherd*, 12 Heis., 280; *Whiteley v. Davis*, 1 Swan, 333; *Bartee v. Tompkins*, 4 Sneed, 638; *Hoyal v. Bryson*, 6 Heis., 141; *Scott v. Fowlkes*, 12 Heis., 700; *Allum v. Stockbridge*, 8 Bax., 358.

6. INFANT. *Party to suit, when.*

An infant becomes party to a suit in such sense as to be bound by the result, where, in several consolidated cases, he is described in one of them as an unborn child and a necessary defendant, and is subsequently brought before the Court by process issued upon order of the Court, and in another of the consolidated cases he becomes a complainant by next friend. (*Post*, pp. 21, 22, 27.)

 FROM SHELBY.

Appeal from Chancery Court of Shelby County.
W. D. BEARD, Ch.

MALONE & MALONE, and B. M. ESTES for Boyd.

MORGAN & McFARLAND, TURLEY & WRIGHT, METCALF & WALKER, and M. B. TREZEVANT for Robinson.

WILKES, J. The main purpose of this first-named cause is to have the Court construe the wills of John B. and William H. Robinson, devising property valued at over \$100,000.

The original bill was filed by Alston Boyd and wife, Leila R. Boyd, Alston Boyd as administrator *de bonis non* of John B. Robinson, deceased, and

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of William H. Robinson, deceased, and by Alston Boyd as the next friend of his five minor children, namely: Bessie, Mary, Alston, Jr., Leila, and Martha Boyd, against Eula C. Robinson (now Farnsworth) in her own right, and against Eula C. Robinson (now Farnsworth) and L. B. McFarland, as executrix and executor of John B. Robinson, Jr., deceased.

The bill was sworn to by Alston Boyd, on October 16, 1889, and, on the same day, a motion was made for an injunction restraining the defendant from removing or opening the iron safe of W. H. Robinson, and removing therefrom all of the valuable papers of W. H. Robinson and John B. Robinson, Sr. Upon hearing the application, on October 17, 1889, the Chancellor overruled the motion for an injunction.

As no injunction was obtained, complainants prepared an amendment to the original bill, and the two, being attached, were together filed as one bill, on January 15, 1890.

The complainants averred that John B. Robinson died in 1885, having first made his will, by which he directed as follows:

“Item Second.—I give and bequeath all my estate, real and personal, of every description and wherever situated, absolutely, to my sons, William Henry Robinson and John Beverly Robinson, Jr., to be equally divided between them. In case of the death of either of my sons before my death, leaving children born in lawful wedlock, then his

share to his child or children, as the case may be. But in the event of the death of either of my two sons before reaching his majority, or in the event of his dying intestate and without children born in lawful wedlock, then his share to his surviving brother.

“Item Third.—In case of the death of both of my said sons, neither leaving children born in lawful wedlock, then I give my whole estate to my daughter, Mrs. Leila Boyd, the personalty to her absolutely, the realty to her sole and separate use for life, with remainder over to her children.”

The bill averred that testator's two sons, mentioned in this item of the will, had both survived the testator and then died, after attaining their respective majorities, without any children, and therefore complainants were entitled to the estate of John B. Robinson, Sr.; that William H. Robinson died two years after the death of his father, namely, in 1887, having first made his will, the second item of which is in these words: “I give all of my estate of every kind, real and personal, and wherever situated, to my brother, John B. Robinson, and his lawful heirs. If he dies without such heirs, then I give every thing to my sister Leila Boyd, the personalty to her absolutely and the realty to her for life, with remainder over to her children;” and that the said John B. Robinson, Jr., mentioned in this item of the will, had, two years after the death of his brother, namely, 1889, died without leaving any child him surviving,

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no child ever having been born to him. Wherefore, Mrs. Boyd and her children claim that, under this section of the will of W. H. Robinson, they were entitled to all of the estate of which W. H. Robinson died seized and possessed.

The bill further avers that the said John B. Robinson, Jr., by his last will, devised every thing of which he was possessed to his wife, Eula C. Robinson (now Farnsworth), and that the said John B. Robinson, Jr., being in possession of the estates of his father, John B. Robinson, Sr., and his brother, W. H. Robinson, under their wills, the possession passed to the said Eula C. Robinson (now Farnsworth), who refused to give possession to the complainants to any part of the estates either of John B. Robinson, Sr., or W. H. Robinson, she insisting that the limitations over in the wills of these two testators in favor of Mrs. Boyd and her children were void, and that John B. Robinson, Jr., took a fee both in the estate of his father and his brother.

The bill avers that John B. Robinson, Sr., was a man of great prudence and skilled in business affairs, and that, having received by his wife (Mrs. Boyd's mother) soon after his marriage, some ten thousand dollars in cash, and, using this as a nucleus, he had from time to time invested and re-invested, and by his speculations and trades had accumulated a large estate, and that in the fifties he began taking title to this property, either in his name, as trustee for his wife and children, or

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else had conveyances made to his wife for her life with remainder over to his children and their children, upon certain conditions and limitations, while other property, and notably the Planters' Insurance property and the property on Vance Street, was conveyed by John B. Robinson, Sr., directly and unconditionally to his children, in the year 1875.

In 1873, Leila Boyd intermarried with Alston Boyd, by whom she had five children, all living at the date of the filing of the bill, and two of whom had been born prior to the year 1877.

In April, 1877, a family settlement was had with regard to the entire trust estate, the immediate cause of the settlement being an application of Mr. and Mrs. Alston Boyd to have set apart to Mrs. Boyd, in severalty, her one-fourth of the trust estate, there being, at that time, four children of John B. Robinson, Sr., namely: John Douglass Robinson, Leila R. Boyd, William H. Robinson, and John B. Robinson, Jr.

At this date, Douglass and Leila were over twenty-one years, W. H. was twenty and Jno. B., Jr., was thirteen years of age. Valuations were put upon all of the trust estate, and the indebtedness of the estate was then set out, amounting to something over \$10,000. Mrs. Boyd was required to account for what she had theretofore received.

John B. Robinson, Sr., put in certain personal property disclosed by the bill, and insisted that as to a part of the property he had a life-estate, and

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that as to all of the property he had a right to control it as one estate during his life. Considerable irritation arose out of the different views and contentions of the parties, but the result was a strictly family settlement, by the terms of which each child was to take one-fifth of the entire trust estate, and assume one-fifth of the debts of the estate, and John B. Robinson, Sr., was to take one-fifth of the entire trust estate, and assume one-fifth of the debts. In other words, instead of the estate being divided into four parts between the four children of John B. Robinson, Sr., John B. Robinson, Sr., was to get a child's part of the estate, and the estate was divided into five equal parts.

A bill was filed in the name of John B. Robinson, Sr., Alston Boyd, and his wife Leila, in order to ratify and confirm the family settlement, and to have set apart to Leila Boyd one-fifth of the estate, she having selected the house and lot on Front Street as her one-fifth of the entire estate, and agreed to pay her father \$4,400 in order to equalize her share with the others, which she afterwards did. That while the agreement was, in fact, that Mrs. Boyd should receive only one-fifth, and while she only received this amount, yet the chancery proceedings were so conducted as to make it appear to the Court that she was in truth receiving one-fourth thereof.

Upon the death of Douglass Robinson, litigation sprung up between John B. Robinson, Sr., and his

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two surviving sons on the one side, and Annie D. Robinson, the widow of Douglass, on the other, in which John B. Robinson, Sr., and his two sons, John B., Jr., and William H., filed a cross-bill, in which they set up the terms of the family settlement of 1877, and averred that, by and under that settlement, John B. Robinson, Sr., was possessed with a child's part of the estate, and averring that after the setting apart to Leila Boyd of the Front Street house, the entire trust estate was owned equally by the three children and their father, and the cross complainants prayed a partition of the estate in these proportions; that in this cause (to which Boyd and wife were not parties) the Chancellor decreed that there had been a family settlement in 1877, and that John B. Robinson, Sr., by the terms thereof, was to receive, and be vested with, a one-fifth interest therein; but the representatives of Douglass Robinson, having plead the statute of frauds, the plea was sustained, and after this such proceedings were had in the cause that the estate of Douglass Robinson was declared insolvent, and all his part of the trust estate was set apart in severalty incumbered with his widow's dower, and the same was sold to pay debts adjudged to be due from his estate, when it was bought in at chancery sale by W. H. Robinson, who paid for the same by using the claims of John B. Robinson, Sr., adjudged due him from the estate of Douglass, and nearly sufficient in amount to liquidate the entire purchase-money due from

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him; that W. H. Robinson probated the will, and qualified as executor of J. B. Robinson, Sr., deceased, but took no further steps whatever, so far as the records of the Probate Court disclose; that upon the death of W. H. Robinson, John B. Robinson, Jr., probated his will, and took out letters testamentary, but never took any other steps in the administration of the estate, so far as the records of the Probate Court disclose; that soon after the death of John B. Robinson, Sr., namely, in 1886, the two brothers, William H. and John B., Jr., divided the entire trust estate standing in their names or in the name of their father, each one taking property supposed to be in the aggregate of equal value.

In this division no distinction whatever was taken with regard to any of the property owned by them, or the source from which it came, and there was thrown into the division thirteen acres of land owned by John B. Robinson, Sr., near the National Cemetery, and which had never belonged to the trust estate.

That the brothers remained in possession of the property received by each in the division of 1886, until the death of W. H. Robinson, and thereafter John B., Jr., continued in the possession of the entire estate to his death, after which time his widow succeeded him, and refused to allow Mrs. Boyd to enter and take possession of the estates of her father and brother, under the wills above named, claiming that the limitations over in her

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favor were void, and that her husband took an absolute fee, which passed to her upon his death, under the terms of his will.

During the pendency of the present suit, namely, on November 12, 1891, the posthumous child and only heir at law of John Douglass Robinson, filed her bill against the complainants, E. C. Robinson (now Farnsworth) and Alston Boyd *et al.*, in which she insisted that, by the terms of the deed made by John B. Robinson, Sr., in 1859, in which he conveyed to his wife for life, with certain limitations over to her children, the property on Main Street, commonly called the "trunk store," J. D. Robinson had a mere life-estate, and that, upon his death, she took a fourth interest therein, as purchaser under the deed of 1859, and not as heir of her father; and that, by the terms of the same deed, upon the death of W. H. Robinson, she took a third of his interest in said lot; and, likewise, upon the death of John B. Robinson, Jr., she took a half-interest in said lot; and she prayed for a writ of possession, for an account of back rents, and for the establishment of her title, etc.

Answers were filed by all of the defendants, and the cause was regularly put at issue; but, in order that the whole subject-matter of the litigation might be settled in the present case, an amended and supplemental bill was filed herein, on January 11, 1892, setting up the filing of the bill in *Robinson v. Robinson*, making said Annie Douglass

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Robinson a party to this bill, and insisting that, in case it should turn out that Annie Douglass was entitled to the interest she claimed, then that J. B. Robinson, Jr., and W. H. Robinson, in making the division, in 1886, were under a clear misapprehension as to their rights and title to this lot, which was very valuable, and praying that, in case said Annie Douglass Robinson recovered, then that complainants have compensation over against Eula C. Robinson for the loss occasioned by such recovery.

In the case of *Robinson v. Robinson*, said Annie Douglass also insisted that she took as purchaser, under another deed of Newton Ford and others to John B. Robinson, the lots situated at the corner of Main and Winchester Streets. But, as to this property, in the division of 1886, half thereof fell to John B., Jr., and half to W. H. Robinson, while, as to the "trunk store" lot, the whole thereof fell to W. H. Robinson.

The first amended bill also brought before the Court Dennison and wife, and relief was prayed against them upon the following facts stated briefly: That W. H. Robinson had purchased a claim owned by A. P. McNeal, administrator, etc., against J. P. Caruthers, which claim was a lien upon certain real estate near the city of Memphis; that one B. M. Stratton was jointly interested with said Robinson in the profits of the venture; that before the death of Robinson, McNeal and Stratton conveyed their interest in the claim to said W. H.

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Robinson, who, at the time of his death, was prosecuting a suit in the Chancery Court to subject the real estate of Caruthers to the payment of his claim; that after the death of W. H. Robinson, John B., Jr., as his executor, prosecuted the chancery case, had the land sold, and bought it in for \$3,700, paying for the same by crediting his bid with the claim belonging to the estate of W. H. Robinson. After this, John B., Jr., sold and, by his deed, conveyed to Mrs. Dennison a part of the Caruthers property, the consideration being \$2,200, of which \$400 had been paid before the filing of the bill, and the remainder, or \$1,800, being still due and unpaid. The bill insisted that, as to this Caruthers property, it having been purchased by John B. Robinson, Jr., with the claim of his brother, in which he had only a limited interest, that upon his death the title thereto vested absolutely in complainants, and they prayed that it be so declared, and, if this relief was not proper, then for general relief.

The bill showed that W. H. Robinson had acquired considerable property after the division between himself and his brother in 1886, and that he had sold a part of this property to Patterson and Cooney, receiving a part of the consideration in cash, and the balance being on time; that John B., Jr., as executor of W. H. Robinson, had collected of Patterson and Cooney a considerable amount due on their purchase, and that a considerable amount still remained due and unpaid, as to

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which the bill sought to recover the amount so paid by them to John B. Robinson, Jr., and as to the remainder it seeks judgment against Patterson and Cooney therefor.

The prayer of the bill was for a construction of the wills of John B. Robinson, Sr., and William H. Robinson, and that the limitations over in said wills to the complainants be declared good and valid, and that complainants be put into possession of the estates of said John B. Robinson, Jr., and William H. Robinson; that, under and by the family settlement of 1877, John B. Robinson, Sr., be declared to have had a child's interest in the entire trust estate, and that this be ascertained and complainants put in possession thereof; that the defendants be charged with all rents from the date of the death of John B. Robinson, Sr., for an accounting and general relief.

In the case of *Porter v. Boyd*, the Planter's Insurance property, under a bill by D. T. Porter against all of the persons claiming to be heirs or devisees of W. H. Robinson, was sold, said Porter and Robinson having been tenants in common of this property. At the sale Alston Boyd became the purchaser of the property at the sum of \$51,000, and the half thereof going to the representatives of W. H. Robinson is in Court, to be disposed of by decree in this cause.

The case of *Levy v. Robinson*, was a bill filed by Levy against E. C. Robinson (now Farnsworth), and Alston Boyd and wife, in which Levy averred

that he had rented the property on Main Street, commonly called the "trunk store," from John B. Robinson, Jr., for a term of years, at a rental of \$300 per month; that Boyd and wife were claiming to be entitled to the rent, as also were Mrs. E. C. Robinson (now Farnsworth). Wherefore he filed his bill of interpleader in order that the Court might decide which was entitled to the same. Under a decree, in this cause, Levy paid into the Court his monthly rent, which had accumulated to the amount of about \$5,000, after which the house burned down, and by the terms of the lease the rent ceased. This fund is now in this Court, to be disposed of by decree in this cause.

The case of *Malone v. Boyd* was a bill brought by Malone to sell a lot on Orleans Street which he and W. H. Robinson owned in equal moieties as tenants in common. The land was sold for partition, and the proceeds (\$1,950) are now in the hands of the Clerk and Master of the Chancery Court, to be disposed of under a decree in this case.

The case was heard before his Honor, Chancellor W. D. Beard. The result was that the Chancellor ruled as follows:

1. That under the third item of John B. Robinson's will, Mrs. Boyd took a life-estate in all of his realty, with remainder in fee to her children; and, as to the personalty, Mrs. Boyd took an absolute estate, and that she was entitled to collect the rents from the realty from the death of her brother, John B. Robinson, Jr.

2. That under the second item of Wm. H. Robinson's will, Mrs. Boyd took an estate for life in his realty, with remainder in fee to her children, she taking his personalty absolutely, with the right to demand rents of the real estate from the death of her brother, John B. Robinson, Jr., Mrs. Boyd being adjudged entitled to all the rents of the property of Wm. H. Robinson, except as to the first piece mentioned, commonly called the "trunk store," as to which she was entitled to eight-ninths of the rents, and Annie Douglass Robinson to the remaining one-ninth.

3. As to the rents which had accumulated in Court from this "trunk store" property, in the case of *Levy v. Robinson*, the same was ordered transferred to the credit of this cause, there to be disposed of under the principles of the decree herein—namely, Mrs. Boyd to take eight-ninths and Annie Douglass Robinson one-ninth of the rents.

4. As to the fund in Court arising from the sale of the Planters' Insurance building, sold in the case of *Porter v. Boyd*, it was decreed to be treated as real estate, Mrs. Boyd to have a life-estate therein, remainder to her children.

5. That the fund arising from the sale of the Orleans Street property, in the partition suit of *Malone v. Boyd*, was to be treated as real estate, and disposed of as the fund in *Porter v. Boyd*.

6. The bill was dismissed as to Dennison and wife, the Court holding that John B. Robinson,

Jr., having a life-interest in the claim against the Caruthers property, could dispose of that claim in any manner he saw proper, and that there was no resulting trust in favor of the remainder-men, such as would entitle them to follow the land itself, and oust Dennison and wife therefrom.

7. In pursuance to the ruling made next above (No. 6), the Chancellor declared that there was no resulting trust against Mrs. Farnsworth as to the 3.83 acres Caruthers land, but further held that the estate of John B. Robinson, Jr., was chargeable with whatever might be the interest of Wm. H. Robinson in the claim purchased from the Bills' estate against this Caruthers property, to the extent it was used by John B. Robinson, Jr., in the purchase of the Caruthers place.

8. In so far as the bill sought to recover the one-fifth interest, or child's share, which it was claimed John B. Robinson, Sr., had in the trust estate under the family settlement of 1877, or in so far as alternative relief was sought, to the effect that in case the family settlement was not enforced, then that compensation be made for the repudiation of the same, the bill was dismissed.

9. It was adjudged that, inasmuch as Annie Douglass Robinson, in the case of *Robinson v. Robinson*, should recover a one ninth interest in what is known as the "trunk store," it would result in a loss to Mrs. Boyd to that extent, the Chancellor decreed that, under all the circumstances of the case, it would be equitable to make this loss fall

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equally upon Mrs. Boyd and upon Mrs. Farnsworth—that is, that Mrs. Boyd should recover of Mrs. Farnsworth one-half of the value of the one-ninth interest so recovered by Annie Douglass Robinson.

10. Upon the same equitable principles, inasmuch as Mrs. Farnsworth would lose the thirteen acres of land which formerly belonged to John B. Robinson, Sr., the Chancellor ordered that one half of this loss should be charged to Mrs. Boyd.

11. The Court ordered a reference to the Clerk and Master to take proof and report: (1) What the personal estate of John B. Robinson, Sr., consisted of. (2) Of what did the personal estate of William H. Robinson consist. (3) What rents Mrs. Farnsworth had collected from the real estate belonging to the estates of John B. Robinson, Jr., and William H. Robinson. (4) What debts of William H. Robinson were paid by the executor, John B. Robinson, Jr. (5) He was directed to report on all other matters of charge and discharge equitably existing between the parties.

On August 17, 1892, Mrs. Eula C. Robinson (now Farnsworth), individually and as executrix of John B. Robinson, Jr., and L. B. McFarland, executor, prayed a broad appeal from the foregoing decree. Annie Douglass Robinson also appealed. The Boyds did not pray an appeal, but sued out a writ of error, and assign as error to the action of his Honor, the following:

1. In dismissing the bill as to Dennison and wife.

2. In declaring that there was no resulting trust in favor of Mrs. Boyd and her children in and to the 3.88 acres of Caruthers land.

3. In dismissing the bill as to the one-fifth interest of John B. Robinson, Sr., in all the property involved in the case, as shown in the decree.

4. In adjudging and decreeing that the limitations of the deed of November 1, 1859, from John B. Robinson to Elizabeth B. Robinson were valid, and that, under the deed, Annie D., the child of John Douglass Robinson took or was entitled to receive one-ninth of the lot on Main Street, in Memphis, known as the "trunk store" lot, or any interest in or share of it whatever; and in adjudging and decreeing that the complainant, Leila Boyd, and her children were not the true owners of and entitled to this entire property.

5. In adjudging and decreeing that Eula C. Robinson was entitled to recover of complainant, or to be compensated for the one-half of the value of the thirteen acres of land that formerly belonged to John B. Robinson, Sr.

6. In adjudging and decreeing that Annie D. Robinson was entitled to recover any share of or interest in the "trunk store" lot.

The holding of the Court as to the two deeds, the one to the Winchester lot and the other to the Main Street lot, was assigned as error for Mr. Robinson. The Court held that these two deeds had been construed in the two cases of Annie D. Robinson against John B. Robinson, Sr., *et al.*, and

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John B. Robinson, Sr., administrator, against Annie D. Robinson *et al.*, referred to above; that, under this construction, it was held that the interest of John D. Robinson in said two pieces of property was a fee-simple, absolute interest; that, inasmuch as Annie D. Robinson, the daughter of John D. Robinson, was a regular party to said two cases, such construction was *res adjudicata* as to her. The Court further held, however, that this adjudication did not extend to or include the interest represented by W. H. Robinson in the Main Street lot, and as this interest had fallen in after the decrees in said two cases, said decrees were not *res adjudicata* as to such interest. As to this interest, the Court held that, under the deed, the Main Street property, W. H. Robinson having died without children, his one-third thereof, passed, by the terms of said deed, to Annie D. Robinson, Mrs. Boyd, and John B. Robinson, Jr. Under this ruling, a one-ninth interest in said Main Street lot was decreed to the said Annie D. Robinson.

The action of the Chancellor in decreeing this one-ninth interest to Annie D. Robinson in the Main Street lot was assigned as error.

The Court further construed the wills of John B. Robinson, Sr., and W. H. Robinson. Under this construction, it was held that the real and personal property of both John B. Robinson, Sr., and W. H. Robinson, on the death of John B. Robinson, Jr., passed to Mrs. Boyd and her chil-

dren, the personalty to Mrs. Boyd absolutely, and the realty to her for life, with remainder to her children. This is assigned as error.

Various assignments of error were made on behalf of Annie Douglass Robinson, all of which have been duly considered in the cause of *Annie D. Robinson et al. v. Eula C. Robinson et al.*, heard herewith. It is claimed the Court erred as follows:

1. In that it adjudged that complainant was, in legal effect, a party to the cause of *John B. Robinson v. Annie D. Robinson et al.*, No. 3210, R. D., of said Court, and was party thereto in such a capacity, and under such state of pleadings therein that her interest in the properties involved in this cause and controversy are concluded by the proceedings and decrees in said cause.

It is insisted that complainant was not, in legal effect, a party to said cause at all, the bill having been filed before her birth, and she having been made a defendant thereto by a mere order of Court, without any supplemental or additional pleadings, reciting the fact of her birth, and ordering summons to issue requiring her to appear on or before a named rule-day. The said order was void, and complainant was never legally made a party to said cause.

2. If complainant was ever legally made a party defendant to said cause, she was made such defendant only as the heir at law of John Douglass Robinson, her deceased father, and not in her ca-

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capacity as claimant of an independent interest in the property, as purchaser under the deeds, Exhibits A and B, to the original bill herein.

3. The said cause, No. 3210, being a bill filed to administer the estate of John Douglass Robinson as insolvent, could not be used for the purpose of settling questions of conflicting title to the estate belonging, or supposed to belong, to the intestate.

4. Whether it be true or not that an insolvent bill in chancery could be used for the purpose of settling conflicting and hostile claims of title, it was not, in said cause No. 3210, undertaken to be used for that purpose within the proper meaning of the pleadings, proceedings, and decrees in that cause, the Court intending only by the proceedings and decrees therein to sell the property there involved *on the assumption* that they belonged in fee-simple absolute to John Douglass Robinson, but without an adjudication to that effect as against this complainant's interest as purchaser under said deeds, the record not showing any such adjudication against this petitioner, but, on the contrary, that the intent was to sell the interest of the intestate's heir therein as heir, without undertaking to determine, as against this complainant's claim as purchaser, what that interest was.

Said record fails to show any pleadings, issue, or adjudication as to the claims of this complainant as purchaser under said deeds.

5. The proceedings and decrees in said cause

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cannot be determined to be conclusive of complainant's interest as purchaser under said deeds, Exhibits A and B, by argument, inference, or construction from the points that were actually adjudicated in said cause.

6. This complainant having prosecuted a broad appeal in said cause No. 3210, the decrees rendered therein were thereby vacated. The effect of the record, therefore, upon the interests of this complainant under said deeds, Exhibits A and B, must be determined by a consideration and determination of the true intent, meaning, and legal effect of the decree rendered by the Supreme Court of the State in said cause. That decree was a consent decree, based upon a contract of compromise.

The evidence herein shows that said contract of compromise was not intended to affect the interests of complainant in the properties involved in said cause No. 3210, except in her capacity as heir at law of her deceased father, John Douglass Robinson. The said contract of compromise, construed in the light of the contents of said record No. 3210, R. D., and of the record of *C. W. Metcalf, guardian, v. Annie D. Robinson*, No. 5700, R. D., of said Court, will not be construed as meaning more than a final cession and surrender of all of the matters involved in said litigation affecting this complainant (defendant herein) as *the heir at law* of her said father.

The said decree of this Court affirming the decrees of the Court below will be construed, and the

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legal effect thereof determined, just as, and upon the same principles, that would govern in the consideration and determination of the construction and legal effect of the decrees of the Court below, if this Court should hold that its said decree, under any circumstances, should be given any more effect than was intended by the contract of compromise.

7. The Court below, in and by the decree therein entered, adjudged that the petitioner was entitled as purchaser, under said deeds, Exhibits A and B, to a four-ninths interest in said property on Main Street, near Monroe, and a one-third interest in said property at the corner of Main and Winchester Streets; that such interests, not coming to her by descent from her father, were not subject to sale for the payment of her father's debts; and that the decree for sale thereof, made in said cause No. 3210, was erroneous. The said error—if the record and proceedings in said cause No. 3210 be taken, as was done by the Court below, as an adjudication against the claim of petitioner as purchaser under said deeds—was error apparent; and, both because petitioner was then an infant and because said error was and is error apparent, the decrees in said cause No. 3210 should have been reviewed and corrected to conform to the rulings made by the Court below as to the original rights of petitioner in said property.

Petitioner should not have been precluded from relief on this aspect of the case by the fact that said decrees in No. 3210 were affirmed by this

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Court, such affirmance having been made by consent, under the contract of compromise made by petitioner's guardian, and the same having been intended only to consummate the cession and surrender of all petitioner's interest in said property, and the rents thereof as the heir at law of John Douglass Robinson, upon the terms agreed upon by way of compromise. There has been no adjudication by the Supreme Court of the State upon the claims of petitioner as purchaser under said deeds, Exhibits A and B, and petitioner, in asking that the decrees in said cause No. 3210 be reviewed and corrected, does not ask to review and correct any ruling made by the Court of last resort.

8. The Court below should have decreed in favor of this complainant to the extent of a two-thirds interest in the property on Main Street, near Monroe, and of a one-third interest in the property at the corner of Main and Winchester Streets, under the last paragraph of the amended bill, the substance of which is that if the contract of compromise and the decree of the Supreme Court of the State entered thereon be held broad enough, in their general terms, to embrace and conclude the interests of this complainant as purchaser under said deeds, such contract and decree ought to be set aside and reformed to that extent, upon the ground that the said contract was made, and the said consent given by mistake on the part of the representatives of this complainant, and in ignorance of the material facts involved; and upon the further ground

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(shown in said paragraph) that Wm. H. Robinson and his solicitor knew, or had reason to know or believe, that the representatives of this complainant did not, at the time of said compromise and consent decree, intend to embrace and conclude her interests as purchaser under said deeds.

9. The Court erred in holding that the limitation over of the interest vesting primarily in John B. Robinson, Jr., was void, because violating the rule against perpetuities.

A very able, exhaustive, and ingenious argument is made to sustain these assignments, and to protect the interest of Annie Douglass Robinson, which has been carefully considered, and to which due weight has been given, but which we cannot set out at length in this opinion. Without attempting to dispose of each of these matters *seriatim*, we only deem it necessary to pass upon the controlling features.

First.—The family settlement made in 1877, should be sustained in every respect, and all rights growing out of the same should be rigidly enforced.

Family settlements are always sustained in Courts of Equity, unless it clearly appear that there is manifest error; and, even in case of persons under disability, will not be disturbed after a long lapse of time, and the accrual of other rights thereon. *Summers et al. v. Wilson et al.*, 2 Cold., 469; *Williams et al. v. Sneed*, 3 Cold., 533; *Farnsworth v. Dinsmore*, 2 Swan, 38; *Owen and wife v. Hancock*, 1 Head, 563; *Reynolds v. Brandon*, 3 Heis., 593; *An-*

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deeds v. Andrews, 7 Heis., 235; *Darden v. Harrell*, 10 Lea, 421.

Annie Douglass Robinson is bound by the decrees made in the causes of *Annie D. Robinson v. Jno. B. Robinson et al.*, No. 3102, rule docket No. —, and *Jno. B. Robinson, Adm'r, v. Annie D. Robinson et al.*, No. 3210 rule docket, and *C. W. Metcalf v. Annie D. Robinson et al.*, No. 5700 rule docket.

She was properly before the Court in these causes. The pleadings in the first-named case referred to her as an unborn child and necessary party. In one case she was made complainant by next friend, and in the others she was served with process, and represented by guardian *ad litem*. In each case it was necessary to determine the interest of Jno. D. Robinson in the real estate, in order to determine in the one case the lands in which the widow was entitled to dower, and in the other to determine what lands were subject to be sold for the debts of Jno. D. Robinson. In both cases the Court must necessarily have passed upon the rights of the minor child, and in the last-named case the interest of the minor was the special matter under consideration.

The prayer for the construction of the two deeds was sufficient to give the Court authority to construe them; and whether it construed them according to the present contention is not now material.

The pleadings in the consolidated causes raise

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the construction of said deeds, and were sufficient to prevent defendants from being surprised or misled in any way. *Shepherd v. Shepherd*, 12 Heis., 280; *Whiteley v. Davis*, 1 Swan, 333; *Bartee v. Tompkins*, 4 Sneed, 638; *Hoyal v. Bryson*, 6 Heis., 141; *Scott v. Fowlkes*, 12 Heis., 700; *Allum v. Stockbridge*, 8 Bax., 358.

Annie D. Robinson was a party to said proceedings, not only as heir, but also as child of John D. Robinson by apt designation, if that be material, which it is not necessary to determine. She was, however, described before the Court for all the purposes essential to determine her interest and dispose of the property in controversy.

Even if the Court's attention was not actually called to the particular points now made in argument on behalf of the minor, Annie D., still that would not prevent the decree rendered from being conclusive as to the parties in said consolidated causes.

The rule is that the pleading of *res adjudicata* applies, except in special cases, not only to the points upon which the Court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belongs to the subject of litigation, and which the parties, exercising a reasonable diligence, might have brought forward at the time. *Beloit v. Morgan*, 7 Wall., 623; *Nicholson v. Patterson*, 6 Hum., 394; *Thompson v. Blanchard*, 2 Lea, 528; *Parks v. Clift*, 9 Lea, 524; *Nolan v. Cameron*, 9 Lea, 234; *Embry v.*

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Connor, 53 Am. Dec., 325; 5 Am. & Eng. Ency. of Law, 384, note 6; *Freeman on Judgments*, Secs. 253, 260, 266.

Besides, after decree in these consolidated causes, and pending appeal in the Supreme Court, on application of her regular guardian to the Chancery Court, she was permitted to compromise and receive a large consideration for, and in settlement of her interest involved. This was fairly done, and it does not matter that the consideration, on a better view and investigation, was inadequate. There was no fraud, and she was bound by this settlement, and the decree of the Court below in the case of *Annie D. Robinson v. Eula C. Robinson et als.* is in all things affirmed.

The Chancellor erred in the construction of the will of John B. Robinson, Sr. This will is as follows:

“Item Second.—I give and bequeath all my estate, real and personal, of every description; and wherever situated, absolutely, to my sons, William H. Robinson and John Beverly Robinson, Jr., to be equally divided between them. In case of the death of either of my sons before my death, leaving children born in lawful wedlock, then his share to his child or children, as the case may be. But in the event of the death of either of my two sons before reaching his majority, or in the event of his dying *intestate* and without children born in lawful wedlock, then his share to his surviving brother.

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"Item Third.—In case of the death of both of my said sons, neither leaving children born in lawful wedlock, then I give my whole estate to my daughter, Mrs. Leila Boyd, the personalty to her absolutely and the realty to her sole and separate use for life, with remainder over to her children."

The second and third items must be construed together, and in the light of the whole will and the circumstances surrounding the parties at the time. When so considered, we are of opinion that the testator intended to divide his property equally between his two sons, and that each should take title in fee-simple; conditioned to be defeated upon the happening of two contingencies: First, dying without children; and, second, dying without making a will. If either son should die leaving children or leaving a will, his estate was at once freed from all conditions and limitations, and became absolute.

It was only in the event that both contingencies occurred, to wit, the dying without children and without a will, that the limitation over was to take effect. The brothers stood upon the same footing, and the right of either to dispose of his property by will was not abridged or affected in any way by the fact that he survived his brother. The limitation over to Mrs. Boyd was defeated as to the share of either when such one died leaving a will disposing of his property. Under the facts in this case, the devolution of the property of John B. Robinson, Sr., after the death of both his sons,

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depended not on the will of the father, but was removed from its operation by the happening of the contingencies therein provided for, to wit, the fact that each son left a will disposing of his property; and, under these wills of the sons, their legatees and devisees took their estates free from the limitations in the father's will.

The share of John B. Robinson, Jr., passed under his will to his widow. The share of W. H. Robinson passed under his will as hereinafter indicated. Under the construction placed on this will by the Chancellor, the son last dying without issue is deprived of the power of disposition by will. But we think no such distinction was intended. The power to will was given equally to each son. No reason can be assigned why the one last dying should be deprived of such power simply because he was survivor. It was evidently the intention of the testator to carry the property over to his daughter only in the event of both sons dying without issue and intestate.

The last clause provides that in case of the death of both sons, neither leaving children, then the estate is to go to Mrs. Boyd.

Now, if this clause is literally construed, it is utterly destructive of the prior provisions of the will. For instance, if William H. Robinson had willed his interest in the property absolutely, immediately upon his death, his devisee would have taken possession of the property, under his will, and the power of John B. Robinson, Jr., to will

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his interest in the property would have been destroyed unless children had been born to him and survived him; and upon the death of John B. Robinson without children, the title of the devisee under the will of W. H. Robinson would be instantly defeated, and the whole estate would go to Mrs. Boyd. Certainly, the testator never intended any such result. Such construction would be a radical revocation of an untrammelled power to dispose by will, previously conferred, or, if it be said that the first son dying might will away his interest in the property, then we would have the anomaly of one son being given one-half the property with full power to dispose of the same by will, and the other being given one-half of the property without power to dispose of it by will, or with the power of disposition by will which would only take effect upon his dying and leaving children surviving him. The language of the will admits of no such construction. Each son is put on the same footing, and is given the same interest and the same power of disposition.

All these difficulties will be obviated, and each clause of the will reconciled by a different construction, and the manifest intention of the testator carried out. The testator manifestly intended that if either of his sons arrived at majority, then he might dispose of his interest in the property by will. But, if he died without making any will, and without any children surviving him, then his interest should go to Mrs. Boyd, and, of

course, if both died without making any will and without children surviving them, the whole estate would go to Mrs. Boyd.

It was contended that John B. Robinson, Sr., never intended that either of his sons should have the right to will any of his property to a stranger. That is to say, that neither son could make any will under which any portion of the property could be willed away from the blood of John B. Robinson, Sr. This proposition is clearly erroneous. For instance, suppose Wm. H. Robinson had married and died without children, and left a will devising all his interest in the property to his widow, and then John B. Robinson had died, leaving children surviving him; clearly, in such an event, Mrs. Boyd could take nothing under the will, because the contingency of both sons dying without children would not have occurred, and thus we have a case where part of the property by the will of one brother would have been carried to a stranger to the testator's blood.

We are of opinion that the shares of W. H. Robinson and John B. Robinson, Jr., in their father's estate passed, by the will of each, according to its terms and provisions, and was not any further controlled by the will of John B. Robinson, Sr.

We come next to consider whether, under the will of W. H. Robinson, his property—whether derived from his father or from his own labor—passed to John B. Robinson, Jr., absolutely, or

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whether it vested in him a conditional fee, or whether the language employed created an estate tail, which, under the statute, would become an estate in fee.

The second item of his will says: "I give all my estate of every kind, real and personal, and wherever situate, to my brother, John B. Robinson, Jr., and his lawful heirs."

It will be conceded that if the will had stopped at this expression, then John B. Robinson, Jr., would have taken a fee-simple estate absolutely upon the death of W. H. Robinson.

But the item proceeds: "If he dies without such heirs, then I give every thing to my sister, Leila Boyd, the personalty to be hers absolutely, and the realty to belong to her for life, with remainder over to her children."

The word "such" refers to, and is correlated with the word "lawful," and the item is properly read, "If Jno. B. dies without *lawful heirs*," then the limitation is to take effect.

The important question is, Shall we give the words *lawful heirs* their strict legal, technical signification of heirs under the law, and next of kin, or shall we give it the meaning of children?

If the latter, the limitation to Mrs. Boyd would be legal, and take effect; if the former, then the limitation would be void, and must fail.

The case of *Middleton v. Smith*, 1 Cold., 144, was decided by Judge McKinney, 1860. The Court says a devise for a daughter and a bodily heir is

operative to invest the daughter with an estate in fee-simple, under Code, § 2813 (2007), and that § 2814 (2008) has no application to such a case. Under the common law, this would have been a conditional fee, and, under our statute, vests the fee in the first taker.

The same doctrine was announced in the case of *Kirk v. Ferguson*, 6 Cold., 484 and 485. The gift was to Rachael Means and to her heirs, the natural issue of her body forever. This was held to create an estate tail, and to come under the provision of the Code above referred to. In this case, there was a limitation over, but it did not take effect.

The same doctrine was held in the case of *Skillen v. Lloyd*, 6 Cold., 503. In this case, the will gave to Valentine Spring and the heirs of her body, for her sole and separate use during her natural life, certain real estate. The Court held that an estate tail was created, and the title vested absolutely in the devisee. It was sought to make a life-estate in the devisee, because of the words, "to her sole and separate use for life." Under § 2812 (2006) of the Code, the Court held that she took a fee, only restricting the marital rights of her husband.

In the case of *Wynne v. Wynne*, 9 Heis., 308, it was held, Judge McFarland delivering the opinion of the Court, upon the following words in a will: "For the natural love and affection I entertain for my son, Peter D. Wynne, I do, at my

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death, lend to him and the lawful issues of his body, a tract of land," etc., that this was an estate in tail, and that Peter D. Wynne took an absolute fee. The Court said lawful issues of his body, and bodily heirs, at common law, would have created an estate tail, or conditional fee, and that it was converted into an absolute fee under the statute.

The limitation of an estate upon contingency of the first taker dying without issue or bodily heir or heirs, is bad, as being too remote an event to suspend a limitation. This is the view insisted on by Mrs. Farnsworth. On the other hand, it is insisted that the testator used the word "heirs" as synonymous with the word "children." That he used it in this sense is apparent, for he says "if he die without such heirs, then I give every thing to my sister," etc. It is also said the word "heirs" has been construed to mean "children" in the construction of a deed, as in *Grimes v. Orrand*, 2 Heis., 298, 300; *Read v. Fife*, 8 Hum., 328. But in each of these cases the deeds conveyed lands *in presenti* to the heirs of a living person, and the Court properly held that a person in life could have no heirs, and therefore the word "heirs" was not used in its technical or usual sense, when coupled with a present disposition, but must be construed as "children," so that we do not consider these cases as in point.

It is also insisted that in cases of wills in the main similar to this, the word "heirs" has been

construed to mean children, and not next of kin, as in *Petty v. Moore*, 5 Sneed, 126; *Cowan v. Wells*, 5 Lea, 682; *Franklin v. Franklin*, 91 Tenn., 123, 124; and the trend of our more recent decisions has been in this direction.

It is replied, however, and with much force, that while the rule is a technical one, which gives to the word "heirs" its technical legal sense, still it has grown into a rule of property as binding on the Court as would be a statutory enactment, and that the Court will not regard it as a mere matter of construction or intention; and it was so held in *Polk v. Faris*, 9 Yer., 234, and sustained as to the general principle of the force and effect to be given a rule of law in *Turley v. Massengill*, 7 Lea, 356; *Hooberry v. Harding*, 3 Tenn. Ch., 677, and other cases.

But in the more recent case of *Armstrong v. Douglass*, 5 Pick., 223, this Court said: "Through the zeal of the Courts to prevent perpetuities, the words dying, leaving no legal descendants, and other like phrases, were long ago given a uniform and technical meaning, whereby they were held to import an indefinite failure of issue, and limitations over depending on them were declared inoperative and void. But, finally, to avoid an equally hurtful extreme, it became the practice of the Courts to explore the whole will, and lay hold of some other expression or circumstance, if necessary, to defeat the arbitrary meaning of such words, and thereby give force and effect to the

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manifestly lawful intention of the testator. Such is the rule of construction to-day, when the common law on this subject is enforced. *Bramlett v. Bates*, 1 Sneed, 555; 4 Kent's Com., 277, 279; 1 Jarman on Wills, 519, note 15."

Looking at this entire will and all the circumstances surrounding the testator, it appears that at the time W. H. Robinson made his will, his brother, John B. Robinson, and his sister, Mrs. Boyd, were his only surviving brothers and sisters and next of kin. He was attempting to provide for the contingency of his brother dying, leaving only his sister, Mrs. Boyd, surviving. He evidently contemplated that his sister, Mrs. Boyd, might survive his brother, John B.; and if we construe the word to mean children, then it is plain he intended Mrs. Boyd to take the property if his brother died without children. But, as Mrs. Boyd was his *heir*, we have him providing for her to take as his *sister* only in the event she was dead, as otherwise the brother would not die without heirs. In other words, if Mrs. Boyd were dead, so that she could not be *heir*, then she was to take under the designation of *sister*.

We think it very clear that W. H. Robinson, by his will, intended his property to go to his sister, Mrs. Boyd, in the event his brother, John B. Robinson, died without children, and, under that will she takes all the property accumulated by W. H. Robinson in his life-time, and not disposed of by him, nor since used in paying his debts, as well

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as his one-half the trust estate, and his one-half of the estate of his father, Jno. B. Robinson, Sr., if not disposed of by him in his life-time, or paid upon his debts, as was held by the Chancellor.

This holding is strictly in accord with the case of *Franklin v. Franklin*, 7 Pickle, 124, 134, in which the will of J. A. Franklin was construed, and which was almost identical in its terms and provisions with the will now under consideration. In that case J. A. Franklin, by his will, gave to his brother, Edward N. Franklin, his entire estate, etc. The will contained this further provision: "In case he dies without heirs, I want my sister, Mrs. Adele Van Bibber, to have it on the same conditions."

It was held that the word "heirs" used in the will manifestly meant children, Mrs. Van Bibber herself being an heir within the terms of the will, unless the word "heirs" there used was intended to mean children.

If the word "heirs" used in this will must be given its usual technical interpretation, we think it a proper case for the application of the rule laid down in the statute (Milliken & Vertrees' Code, § 2815), providing for the construction of limitations made to depend upon the dying without heirs, and there is nothing in the will of W. H. Robinson, when properly construed, which provides for a limitation, to take effect upon an indefinite failure of issue, but rather upon such failure at the death of W. H. Robinson.

The decree of the Chancellor is in all respects

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affirmed, except so far as it construes the will of John B. Robinson, Sr., and, as to that will, must be modified as herein indicated, with the results growing out of the changed construction; and the cause will be remanded to the Court below, to be proceeded with in accordance with this decree.

The costs of the appeal in the case of *Annie D. Robinson v. Eula C. Robinson et als.*, No. 8115, will be paid by the complainants in that cause, the other costs as adjudged below. The costs of the appeal in the cause of *Boyd and wife v. Eula C. Robinson et als.* will be paid by the complainants, Boyd and wife, and the other costs in that cause will be adjudged in the Court below, but none of it will be adjudged against Annie D. Robinson.

Theus v. Dugger.

THEUS v. DUGGER.

(Jackson. June 15, 1893.)

1. MARRIED WOMAN. *Not personally liable upon firm note.*

Personal judgment cannot be obtained against a married woman, over her plea of coverture, upon a note executed by a firm of which she is a member. (*Post*, pp. 46, 50.)

2. SAME. *Method of charging her separate estate.*

A married woman's separate estate cannot be charged with her debts unless she has entered into an express contract that it shall be bound for the particular debt. It cannot be so charged by mere implication. (*Post*, p. 47.)

Cases cited and approved: *Jordan v. Keeble*, 85 Tenn., 412; *Chatterton v. Young*, 2 Tenn. Ch., 768; *Ragsdale v. Gossett*, 2 Lea, 739; *Litton v. Baldwin*, 8 Hum., 209; *Cherry v. Clements*, 10 Hum., 552; *Kirby v. Miller*, 4 Cold., 3; *Shacklett v. Polk*, 4 Heis., 115.

3. SAME. *Same. Example.*

A married woman's separate estate, embarked by her in a mercantile business, as partner with another, cannot be subjected to the payment of a note executed by the firm in due course of the partnership business, in the absence of an express contract on her part to that effect. (*Post*, pp. 46-50.)

Cases cited and approved: *Federlicht v. Glass*, 13 Lea, 481; *Frank v. Anderson*, 13 Lea, 695; *Chatterton v. Young*, 2 Tenn. Ch., 768; *Jackson v. Rutledge*, 3 Lea, 626.

FROM MADISON.

Appeal from Chancery Court of Madison County.
A. G. HAWKINS, Ch.

Theus v. Dugger.

McCORMY & BOND and CARUTHERS & MALLORY for Theus.

HAYNES & HAYS for Dugger.

WILKES, J. The bill is filed by John W. Theus, trustee of the Bank of Madison, which failed September 27, 1890, to collect a note of \$2,230.25, executed by the late firm of W. A. Dugger & Co., composed of W. A. Dugger and Sallie T. Dugger, wife of A. D. Dugger, to the Bank of Madison, and also against Jesse A. Thompson, to set aside, as fraudulent, an alleged sale of the interest of W. A. Dugger in said firm, to Jesse A. Thompson, on the ground that it was made to hinder, delay, defraud, and defeat complainant and the other creditors of the firm of W. A. Dugger & Co. in the collection of their debts.

The note sued on is an ordinary promissory note, providing for the payment of reasonable attorney's fees in case of suit, and is signed "W. A. Dugger & Co."

An attachment was issued, commanding the Sheriff "to attach as much of the estate and interest of the said S. T. Dugger in said partnership property, consisting of a stock of groceries," etc., as would satisfy complainant's debt and costs; and the attachment was levied upon the "entire undivided interest of the defendant, S. T. Dugger, in the stock of goods in possession of J. A. Thompson & Co." A replevy bond was executed.

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The firm of W. A. Dugger & Co. was dissolved October 8, 1892, W. A. Dugger selling his entire interest to his co-defendant and partner, Sallie T. Dugger, notice of the dissolution being published in the Jackson papers; and, thereupon, Sallie T. Dugger formed a partnership with Jesse A. Thompson, under the style of J. A. Thompson & Co., the said Thompson buying an undivided half-interest in the stock of goods, but no interest in the notes, accounts, and choses in action of the late firm of W. A. Dugger & Co. The trade thus made had been in negotiation for six months before the bank failure, and the president of the Bank of Madison had been advised with concerning the same.

A motion to quash the attachment was made, on the hearing, first, because there is no valid or legal ground for the issuance of the same stated or set forth in the bill; second, because there is no allegation in the bill of any legal or valid or subsisting lien, in complainant's favor, upon the stock of goods of said J. A. Thompson & Co., or the interest of S. T. Dugger therein; third, because no valid or sufficient grounds for an attachment are stated, set forth, or shown in the bill. This motion was overruled.

A demurrer was interposed by defendants, Sallie T. Dugger and husband, A. D. Dugger, upon the following grounds:

1. The bill does not state a case that entitles complainant to the relief prayed.

2. The defendant, S. T. Dugger, as shown by the bill, is a married woman, under the disability of coverture, and, as such, is not liable on the promissory note sued on, and she sets up her coverture as a complete defense against liability on said note.

3. To the part of the bill which seeks a personal recovery against defendant, S. T. Dugger, she demurs on the following ground: She is, as shown by the bill, under the disability of coverture, and is not liable on the said note, as the same is stated and alleged in the bill, because it is not shown to have been executed by her with express reference to her separate estate, or that, in fact, she has any separate estate.

4. To so much and such parts of the bill as allege her ownership in the stock of goods sought to be attached by the bill, and seeks to reach the same for the satisfaction of the debt sued on, she demurs on the following ground: She, as shown by the bill, is a married woman; not shown to have any separate estate in the goods, nor to have contracted the alleged indebtedness with express reference thereto; wherefore, her interest in the same cannot, in the manner sought by the bill, be sold or made liable for the said indebtedness.

The first ground of demurrer was overruled, and the second and third grounds, to the effect that S. T. Dugger, as shown by the bill to be a married woman, under the disability of coverture, and,

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as such, not liable on the promissory note sued on, was allowed so as to prevent any decree on said note against said S. T. Dugger personally.

Answers were filed by defendants denying all fraud in the sale and purchase of the stock of goods, and alleging that, while W. A. Dugger sold out his entire interest in the stock, notes, accounts, choses in action, fixtures, delivery-wagon and horse to his co-defendant, S. T. Dugger, that co-defendant J. A. Thompson only bought an interest in the stock and fixtures.

Proof was taken and decree rendered, in which it was adjudged that there was no fraud in the sale of the goods to J. A. Thompson, and that no personal decree could be entered against Mrs. Dugger on said note, but that "the interest of said S. T. Dugger acquired by the investment of her separate estate in said firm is liable to complainant, on account of said indebtedness, and should be subjected to its payment;" and thereupon the Court proceeded to render a personal decree against her and her sureties upon the replevin bond for the sum of \$4,460.50, being double the penalty thereof, but to be discharged by the payment of the sum of \$1,815.36, the balance due on the note sued on.

The question of the alleged fraudulent sale of the stock of goods, and its purchase by J. A. Thompson, and which was the ground laid in the bill for the issuance of the attachment, was abandoned when complainant had the attachment is-

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sued, it being only issued against the "undivided interest of the defendant, S. T. Dugger, in the stock of goods," and the Chancellor found as a fact, and so adjudged in the decree, "that the allegations of fraud in purchasing the stock of goods on the part of J. A. Thompson, and the sale thereof by the said S. T. Dugger, had not been proven, but disproved," and there is no appeal by complainants from this portion of the decree.

Several errors are assigned, only one of which we deem it necessary to notice, as it disposes of the entire matters in controversy.

The question raised by this assignment is in substance this: Is a married woman, owning a separate estate, which she has put into a mercantile business, as a partner with another person, bound by a note executed for partnership purposes in the name of the firm, so that a personal judgment can be rendered against her on such note, or so that the stock of goods belonging to the firm in which she is interested as a partner, can be subjected to the payment of such firm note in the absence of an express agreement on the part of the married woman that the stock of goods in which her separate estate is invested shall be bound for the same?

It has been held that when a married woman engages in business, if she fails to pay a debt incurred by her in that business, the creditor may seize and reclaim such goods as he has sold to

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her as may remain in her possession, provided the same can be identified. *Federlicht v. Glass and wife.* 13 Lea, 487, 488.

It also has been held that land purchased by a married woman, in which her separate estate has been invested, leaving a portion of the purchase-money unpaid, may be sold to enforce collection of that portion of the purchase-money remaining unpaid. *Jackson v. Rutledge*, 3 Lea, 626, 629, 631, But in each of these cases no personal judgment was rendered against the married woman, and the only relief given was against the identical property in the purchase of which the debt was created.

The law is well settled in Tennessee that, in order to bind the separate estate of a married woman, there must be an express agreement or contract binding the same; *it cannot be charged by implication.* *Jordan v. Keeble*, 1 Pickle, 412; *Chatterton v. Young*, 2 Tenn. Ch., 768; *Ragsdale v. Gossett*, 2 Lea, 739; *Litton v. Baldwin*, 8 Hum., 209; *Cherry v. Clements*, 10 Hum., 552; *Kirby v. Miller*, 4 Cold., 3; *Shacklett v. Polk*, 4 Heis., 115.

It is earnestly insisted, however, that when a married woman engages in mercantile business on her own account, or as a partner, and uses her separate estate therefor, she thereby expressly binds her stock of goods and mercantile assets as fully as if she should, by express words, stipulate with each creditor with whom she deals that such stock and assets shall be so bound, and that such ruling does not conflict with our previous holdings that

there must be an express agreement on the part of the married woman, in order to make a charge upon her separate estate.

It is earnestly insisted that this must be so, more especially in cases where the married woman enters into a partnership, because a legal entity is thereby created which has assets primarily liable for its own debts. It is also urged that, to allow a married woman, under such circumstances, to escape liability, both personally and as to her estate, would be a fraud upon her creditors on the one hand, and, on the other, prevent her from obtaining and enjoying that credit necessary to the successful operation of a mercantile business.

We feel the force and weight of these suggestions; but we are of opinion that if we hold a married woman bound by contracts made by her in her business or mercantile ventures simply because she is so engaged, and has a separate estate invested in them, we must do so on the ground that she is bound *by implication of law* rather than upon any *express agreement or contract*.

It would be to lay down a rule for married women engaged in merchandising upon their separate estates different from that laid down in cases where her separate estate is invested or employed in other business or property, and we can see no sound basis for such distinction.

As the law has heretofore been held, and is now laid down, if a married woman, having a separate estate, employ it in mercantile business,

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any creditor, in order to bind her separate estate engaged in such business, need only stipulate with her to that effect. With this simple precaution, the creditor may deal safely with the married woman, and, at the same time, her credit will not only not be impaired, but may be strengthened by the consideration that an express charge has made the creditor feel more secure in extending credit to her.

This is the rule applied in all other cases involving the separate estates of married women, and we think it safer to leave the rule uniform in its application, rather than create distinctions which we cannot rest on any satisfactory basis. This holding is strictly in accord with the previous rulings of this Court upon this subject. *Federlicht v. Glass*, 13 Lea, 481; *Frank v. Anderson*, 13 Lea, 695; *Chatterton v. Young*, 2 Tenn. Ch., 768.

In the case at bar, the note sued on was signed W. A. Dugger & Co., but did not purport to charge the separate estate of Sallie T. Dugger, nor was there any parol evidence that this separate estate or stock of goods was agreed to be bound for its payment.

The note was given, not for the purchase of goods, but in the general conduct of the business of the firm. The goods sought to be subjected to its payment were not the goods of W. A. Dugger & Co. (fraud in the transfer being eliminated), but it was the interest of Sallie T. Dugger in the new firm that was sought to be reached.

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The Chancellor declined to give any personal judgment against Sallie T. Dugger, the married woman, and in this he was correct. It was error, however, to give any decree against the interest of Sallie T. Dugger in the firm assets of J. A. Thompson & Co., or against the goods as the property of W. A. Dugger & Co., or against the parties upon the bond given to replevy the same, and the decree of the Court below in these particulars is reversed with costs.

DISSENTING OPINION.

SNODGRASS, J. I do not agree with the majority in conclusion reached, but am of opinion that a married woman, engaging in a mercantile business on a separate estate, or in a partnership in which she is using such estate, and thus holding herself out to all as so trading, expressly binds that separate estate to every creditor who deals with her in that business. The condition of the business is an advertisement and holding out to the public, and therefore an invitation to each member of the public to deal with her upon the faith of such separate estate, and, consequently, each contract she makes in that business binds her separate estate as an express contract to do so. The contrary

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rule results from considering only the words used in each separate contract with each creditor, and ignoring the conditions under which the words were used. The conditions, the business, the dealing in and only with a separate estate, and the holding out to each creditor, as to all, that such was the business in which he was invited to enter and deal, are all to be considered in connection with, and as essential parts of, each contract; and, thus considered, they supplement the words used, and make out an express contract, or, rather, make what would not, in the absence of these conditions and propositions to the public (and therefore to each member of it), have been a contract to bind a separate estate, in fact as in legal effect such a contract, just as in the case of a partnership holding itself out as such. The contract of each member, in the legal scope of and for that business, binds the firm, though no express words are used proposing to do so.

We have held that a married woman may carry on a mercantile business as a separate estate, and that such business is protected from her husband's creditors. We ought, therefore, not to hold, it seems to me, that it is also protected from her own. Both in her interest and that of the public dealing with her, I think the property invested in such business should be bound.

The thirteenth Lea case, I believe, applied the correct rule of law to facts not calling for the application. The facts of that case have therefore

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made a precedent which, I think, should be overruled, and the doctrine established that a married woman doing business with the public on the faith and credit of investment of her separate estate, and holding herself out as so dealing, binds her separate estate expressly in every contract made in the scope and for the objects of that business, though she does not then and there, in making each business contract, repeat such terms as expressly binds the separate estate.

 Pullman Palace Car Co. v. Gavin.

*PULLMAN PALACE CAR CO. v. GAVIN.

(Jackson. June 21, 1893.)

1. SLEEPING-CAR COMPANIES.

A sleeping-car company is not a common carrier or an inn-keeper.
(*Post*, pp. 56-58.)

2. SAME. *Liability for porter's theft.*

The theft of the money of a passenger on a sleeping-car by a porter in charge of the car, renders the sleeping-car company liable therefor to the passenger. (*Post*, pp. 57, 58.)

Cases cited: 124 N. Y., 58 (S. C., 21 Am. St. Rep., 644); 74 Texas, 654.

3. SAME. *Liable to custodian of passenger's money.*

A passenger who is intrusted with the money of another in his care for the journey, has such a right in the money that he can recover from a sleeping-car company by whose servant it is stolen. (*Post*, pp. 59-61.)

Cases cited and approved: *Criner v. Pike*, 2 Head, 397; *Logan v. Hartford City Coal Co.*, 9 Heis., 690; 42 N. Y., 326 (S. C., 1 Am. Rep., 527); 74 N. Y., 116.

 FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

THOMAS H. JACKSON for Pullman Palace Car Co.

H. C. WARRINER for Gavin.

* An elaborate and exhaustive note on the subject of liabilities as to passengers on sleeping-cars is published in 21 L. R. A., 289, in connection with the above case, and the case of *Mann Boudoir Car Co. v. Dupree*.—REPORTER.

Pullman Palace Car Co. v. Gavin.

McALISTER, J. The object of this suit is to recover the sum of \$150 alleged to have been stolen from M. Gavin while a passenger on a Pullman palace car.

It appears from the record that on the night of the third of August, 1889, M. Gavin, with his immediate family and a few friends, left Memphis for a summer excursion. Among the party was Miss Kelly; and just before the train started, at 10 o'clock, Mrs. Kelly, the mother of Miss Kelly, who had accompanied her to the cars, handed to Gavin, across the aisle, the sum of one hundred and fifty dollars, to be used in defraying the expenses of her daughter during the trip. Gavin deposited the roll of money, without opening it, in his trousers pocket; and, when he retired to his berth, a lower one, about 11 o'clock, he felt the roll of money in his pocket. He then rolled up his trousers and placed them in the receptacle provided for clothes at the head of his berth. The next morning when Gavin awoke he felt for his trousers, and discovered that they were missing. Robinson, the colored porter, was called, and, in response to inquiries, told Gavin that he had found a pair of trousers on the floor that morning, but, supposing they belonged to the section adjoining the head of Gavin's berth, he had placed them in that section. This section was occupied by two well known and reputable citizens of Memphis. Robinson then brought the trousers to Gavin, but the money was missing. Gavin also discovered that

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a bunch of keys was missing from his pocket, but he found therein a sleeve or collar button which was not his property. Robinson informed Gavin that the other porter, one Lind, had found a bunch of keys in the aisle during the night. Robinson then brought Lind to Gavin, and Lind handed him the bunch of keys, and also one or more baggage-checks. Gavin, upon discovering the loss of the money, had the conductor called, and reported his loss. The conductor made some search, but failed to find the money.

During the investigation, it was reported to Gavin that the porter, Lind, had lost one of his sleeve-buttons, and this fact, coupled with the finding of a strange sleeve-button in Gavin's trouser's pocket, at once fixed suspicion upon Lind. Gavin called Robinson and questioned him about the sleeve button, and was told by Robinson that Lind had asked him about his lost sleeve-button.

The car containing Gavin's party was occupied entirely by reputable citizens of Memphis, and many were also in the other sleepers. The train was a special train of five sleepers, and was to run from Memphis to Norfolk without change of cars, and all the sleepers were in charge of only one conductor. No new passengers came aboard at any place between Memphis and Chattanooga. The conductor testified, in regard to the feasibility of one passenger robbing another behind the curtain, that it is possible to be done, but not probable, if the porter is on watch and attending to

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his duty. The record shows that Lind went on watch about twelve o'clock, and remained on watch until three o'clock, when he was relieved by Robinson, who then continued his watch until half-past six the same morning.

Robinson testified that if the porter was at his post and on watch, it would be impossible for any one passing along the aisle, or for a passenger occupying an adjoining berth, to abstract any thing from Gavin's berth without attracting the porter's attention; that such a robbery was impossible without detection when the porter was on watch and doing his duty.

The porter, Lind, testified that no one passing along the aisle could have stolen any thing from a berth without being seen by him while on watch, but that a passenger in a berth might steal from an adjoining section at the head or foot.

The Circuit Judge tried the case without the intervention of a jury, and, being of opinion that the money was stolen by porter Lind, rendered judgment against the company for \$150. The Pullman Palace Car Company appealed, and assigned errors.

The law is well settled that a sleeping-car company is not a common carrier. They differ radically in the kind of service rendered the public. The contract of the sleeping-car company is to lodge the passenger, while that of the carrier is to carry him. Sleeping-car companies are not liable as inn-keepers for the loss or theft of articles

from a guest, for the reason that the passenger on a sleeping-car retains the exclusive personal possession and control of his valuables. The company does not undertake to receive the property of the guest, but expressly declines to do so, and, for this reason, is absolved from the liability of an inn-keeper. It has been so difficult to define the precise legal status of this class of public servants, and the measure of their accountability, that they have been facetiously characterized as "flying nondescripts." It is, however, universally recognized by the Courts that it is the duty of a sleeping-car company to maintain a careful and continuous watch over the interior of the car while the berths are occupied by sleepers. If the property of the passenger is stolen by a fellow-passenger or by an intruder on the train, in consequence of the failure of the company to maintain this careful and continuous watch, the company will be liable for its value. *Carpenter v. N. Y. R. R.*, 124 New York, 58 (S. C., 21 Am. St. Rep., 644). It follows as a corollary from this proposition that, if the servant or agent of the company, charged with the duty of watching and protecting the property of the guest, purloins it himself, the company is responsible.

Says Mr. Wood, in his work on Master and Servant, Sec. 321: "In that class of cases where the master owes certain duties, either to third persons, or the public, whether the same arise from contract or statutory obligations, a different rule of

liability exists from that which prevails when the liability sounds entirely in tort. When by contract or statute the master is bound to do certain things, if he intrusts the performance of that duty to another, he becomes absolutely responsible for the manner in which the duty is performed, precisely the same as though he himself had performed it, and that without any reference to the question whether the servant was authorized to do the particular act. Where the master, by contract or operation of law, is bound to do certain acts, he cannot excuse himself from liability upon the ground that he has committed that duty to another, and that he never authorized such person to do the particular act. Being bound to do the act, if he does it by another, he is treated as having done it himself, and the fact that his servant or agent acted contrary to his instructions, without his consent, or even fraudulently, will not excuse him." 74 Texas, 654.

The first assignment of error is, viz.: "There is no evidence to support the finding of the Circuit Judge, for the reason that the evidence introduced by the plaintiff, shows that the servants of defendant were watchful and diligent, and were guilty of no negligence." The Circuit Judge found that the larceny was committed during Lind's watch—between twelve and three o'clock—and he found, further, that Lind was the guilty party. Upon an examination of the record, we find material evidence to sustain the finding of the Circuit Judge.

The second assignment is that the Circuit Judge erred in finding that the defendant, as a matter of law, was liable to the plaintiff for the loss of the money, for the reason that one passenger has no right to carry upon his person the money of another passenger, and to hold the defendant company liable for the loss.

The third assignment of error will be considered in connection with the second. The third assignment is, viz.: "The evidence shows that the money sued for was not the money of M. Gavin, but the money of Martin Kelly, who was not a passenger upon the car."

The gravamen of this suit is to recover the value of property claimed to have been stolen by the employes of the company who were charged with the duty of preserving it. As already stated, this money came into the hands of Mr. Gavin as a depositary, to be used and expended by him in defraying the traveling expenses of Miss Kelly. It has been held in this State that an actual and exclusive possession by a party, even though it be by a wrong-doer, is sufficient to support an action of trespass against a mere stranger or wrong-doer, who has neither title to the possession in himself, nor authority from the legal owner. *Criner v. Pike*, 2 Head, 397. Ordinarily, says the Court in that case, the party in possession is either the owner of the property or answerable over to the owner, and in either case he is entitled, not only to damages for the taking, but also for the value of the property.

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This is the general rule. A defendant has been allowed to prove, in mitigation of damages, that the goods did not belong to the plaintiff, and that they have gone to the use of the true owner, either by being restored to him in specie, or taken upon legal process in payment of his debts, for in such case the plaintiff is not answerable over.

But Mr. Sedgwick thinks the principle of these decisions has been carried "quite far enough, * * * and that it will not do to permit acts of willful or wanton trespass to be excused by the defense of outstanding titles in third persons." See also *Logan v. Hartford City Coal Co.*, 9 Heis., 690, where it is held that "mere possession is a sufficient title upon which to maintain trespass against a mere wrong-doer." 7 Yer., 387.

Miss Kelly, having been placed in charge of Mr. Gavin, the latter had become the depositary of this money for the purpose of defraying her current expenses as they arose upon the journey.

It has been held that members of the same family, traveling together, may carry each other's effects. *Dexter v. Syracuse Railroad*, 42 N. Y., 326 (S. C., 1 Am. R., 527); *Curtis v. Delaware Railroad*, 74 N. Y., 116.

We think that Miss Kelly, having been placed in charge of Mr. Gavin, was, *pro hac vice*, for the purposes of the journey, a member of his family, and that a gentleman in charge of ladies on such an occasion was their protector, and the proper

custodian of their money and personal effects intrusted to him.

In this view of the case, we think it unnecessary to determine whether, at the time the theft was committed, the money was the property of Miss Kelly or her father, Martin Kelly. The proof shows the money was in the actual possession of Gavin, as its rightful depository.

Other questions of minor importance were considered, and decided orally.

Affirmed.

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POOLE v. JACKSON.

(Jackson. June 22, 1893.)

1. ASSIGNMENT OF ERROR. *Insufficient, when.*

An assignment of error that "the verdict is against the evidence, which largely preponderates against the finding of the jury," is bad, in not stating that there is no evidence to support the verdict. (*Post*, p. 65.)

2. EVIDENCE. *Irrelevant, when.*

In suit against a city for injuries resulting to plaintiff from an alleged defective sidewalk, it is irrelevant for plaintiff to testify on his own behalf that he borrowed the money to build certain houses, as to the erection of which another witness had incidentally testified. (*Post*, pp. 65, 66.)

3. SAME. *As to condition of sidewalk.*

In suit against a city for personal injuries resulting to the plaintiff from an alleged defective sidewalk, it is competent to prove, on behalf of the city, that the sidewalk was laid down in the ordinary way, and constructed out of sound and suitable material, as tending to rebut notice of defects by the city authorities. (*Post*, pp. 66, 67.)

4. SAME. *Same.*

And it is likewise competent, in such case, to prove, on behalf of the city, that the sidewalk was in apparently safe condition, as tending to rebut constructive notice of defects therein. (*Post*, p. 67.)

Cases cited: *Poole v. Jackson*, 91 Tenn., 457; 30 Ind., 235; 83 Ind., 566.

5. CHARGE OF COURT. *As to city's liability for injuries resulting from defective sidewalks.*

The Court's charge in a suit against a city for personal injuries resulting to plaintiff from a defective sidewalk is not erroneous, being properly qualified in other portions of the charge, when given in this language, viz.: "The defendant is not an insurer against accidents upon its streets and sidewalks, but is bound to keep them in a reasonably safe condition, but not absolutely so. Its duty is only to see that sidewalks and streets are reasonably safe for persons traveling on them while exercising ordinary care and caution. It is only bound to use ordinary care and attention to keep its streets and sidewalks in a

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reasonably safe condition for persons traveling in the ordinary modes, by night as well as by day, while exercising reasonable care and caution." (*Post*, p. 68.)

Case cited and approved: *Poole v. Jackson*, 91 Tenn., 457.

6. SAME. *Same. Actual notice of defects.*

The Court's charge, in such case, defining actual notice of defects, is correct in this language, viz.: "By actual notice is meant that, if there was a defect in the sidewalk, and some member of the Board of Mayor and Aldermen, or some agent or employe of the defendant whose duty it was to keep, or see the streets were kept, in repair, saw it, or that some one notified or informed them or some of them of its existence." (*Post*, p. 68.)

7. SAME. *Same. Constructive notice of defects.*

The Court's charge, in such case, defining constructive notice of defects, is correct in this language, viz.: "By constructive notice is meant that, if there was a defect in the sidewalk, and that the defect was so patent and obvious as to be generally noticed by persons passing over it, and this continued to exist for such a length of time prior to the time of the alleged accident as that it might be reasonably inferred that some member of the Board of Mayor and Aldermen, or employe of defendant whose duty it was to keep the streets in repair, had notice of such defects." (*Post*, pp. 68, 69.)

8. SAME. *Same. Notice unnecessary.*

The Court's charge, in such case, that no other proof of notice, actual or constructive, of defects is required if the sidewalk causing plaintiff's injury was originally laid down in a defective condition, and so remained until the injury, is correct. (*Post*, p. 69.)

9. SAME. *Refusal of special request.*

The refusal of the Court to give special requests in charge to the jury is not erroneous, when the original charge is full and correct, and covers the matter embraced in the requests. (*Post*, p. 70.)

FROM MADISON.

Appeal in error from Circuit Court of Madison County. L. S. Woods, J.

Poole v. Jackson.

HAYNES & HAYS for Pool.

CARUTHERS & MALLORY and McCORRY & BOND
for Jackson.

A. D. BRIGHT, Sp. J. This is an action for damages against the city of Jackson, Tenn., brought by plaintiffs for alleged injuries to Mrs. Pool, by having her arm broken, etc., being thrown down by a defective plank walk. The damages claimed in the declaration is \$10,000.

There are three counts in the declaration, setting forth the cause of action with great minuteness. The first count, in short, is for wrongfully and negligently suffering a dangerous hole to be and remain on and across College Street, and to remain out of repair, with notice to the city, etc. The second count, same as first, but adding "without lights," etc. The third count, same as first, but adding allegations "that defendants did negligently build, construct, and place down the defective foot crossway," etc.

The defendant pleaded not guilty, and issue was joined on the plea.

This cause has been tried three times. First time at the May term of 1891, of Circuit Court. Verdict for defendant. A new trial was granted by the trial Judge on account of improper conduct of the jury. The second trial was had at the September term, 1891, of said Court, and resulted in a verdict and judgment for three thousand dollars, in favor of the plaintiff, which

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was, on appeal to this Court by the defendant, reversed and remanded for errors as set out in the opinion of this Court by Justice Lea, reported in 7 Pickle, pages 448 *et seq.* The cause was again tried at the January term, 1893, of the Circuit Court, and resulted in a verdict for the defendant.

Plaintiff's motion for a new trial being overruled by the Court, an appeal in error was prayed for and granted to this Court, and is before us for determination.

The plaintiffs have assigned numerous errors. The first error assigned is that "the Court erred in not granting a new trial on the facts; that the verdict is against the evidence, which largely preponderates against the finding of the jury." This assignment of error is not well taken. It does not state there is no evidence to support the verdict, but presupposes that there is evidence to support the verdict of the jury; and there is ample evidence found in the record to support the verdict.

The second assignment of error is that "the Court erred in sustaining defendant's exceptions to plaintiff's testimony as to borrowing money from the building and loan association, etc., with which to build certain houses."

Witness Haughton, in his cross-examination, in stating for whom he had worked, stated he had worked for Mrs. Pool, and, among other work done for her, he had helped to build three houses for her.

Mrs. Pool, while on the witness-stand, was asked by plaintiff's attorney "where she got the money

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to build these houses." She answered, "From the building and loan association," which was objected to by the defendant, and objections sustained by the Court; and this is assigned as error. This testimony was clearly irrelevant, not tending to elucidate any issue in the case, and wholly immaterial, and was very properly excluded by the Court.

The third assignment of error is in overruling plaintiff's exceptions to the admission of the testimony of John W. Gates, J. T. Beveridge, S. C. Lancaster, H. C. Irby, W. C. Cason, H. C. Jameson, J. H. Duke, John T. Stark, L. B. Shelton, W. F. Price, and G. H. Ramsey.

Gates testified that this walk, where the injury was alleged to have occurred, "was laid in the ordinary way walks were laid in the city." Beveridge testified that the "planks were laid of good, sound timber, usual and customary." This testimony was not incompetent; it was only intended by this to show that the walk, when originally laid, was not defectively done; and that this walk was laid like all other walks of the city, and of good, sound timber, etc.

We have very carefully read the testimony of these witnesses, and can find no real objections to their testimony as admitted by the Court. Much of their testimony was, upon objections of the plaintiff, excluded by the Court from the jury. The controversy just here was an attempt on the part of the plaintiff to fix constructive notice upon the defendant that the said sidewalk was out of

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repair, and that the defect in it was of such a nature and duration as to give constructive notice of same to the defendant; and, to rebut the contention of constructive notice, this testimony was admissible. It is not, nor does it assume to be, an opinion whether the walk was safe or unsafe. The testimony complained of was the question put to these witnesses: "State whether or not the walk was in an apparently safe condition at and before the time of the accident, when you examined it." It was competent to prove that the sidewalk was in an apparently safe condition at and before the time of the accident, in order to show that, from its apparent condition, the defendant would not be chargeable with constructive notice of its being defective or out of repair; and for this purpose it was admissible, and so limited and admitted by the Court. Wharton on Ev., Sec. 512; Stevens on Ev., Sec. 103; 30 Indiana, 235; 83 Indiana, 566.

This Court in this case, in 7 Pickle, 457, said: "The corporation is not required to take up and examine, from time to time, all the plank walks in the city lying on the ground, when the same is *apparently in good condition*." The Court further said in that case: "A corporation may be liable for latent defects over dangerous structures or over dangerous places, and the same should be inspected from time to time, but this cannot apply to a plank sidewalk on the ground." 7 Pickle, 457.

We therefore overrule this assignment of error.

The fourth assignment of error is in regard to

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the charge of the Court, which is as follows: "The defendant is not an insurer against accidents upon its streets and sidewalks, but is bound to keep them in a reasonably safe condition, but not absolutely so. Its duty is only to see that sidewalks and streets are reasonably safe for persons traveling on them while exercising ordinary care and caution. It is only bound to use ordinary care and attention to keep its streets and sidewalks in a reasonably safe condition for persons traveling in the ordinary modes, by night as well as by day, while exercising reasonable care and caution."

This, when taken in connection with the whole charge, is not erroneous; it is almost, if not the identical charge on this point given in this case heretofore, which was passed upon and approved by this Court. 7 Pickle, 457; see also Dillon on Munic. Corp., 2d Ed., Sec. 789.

The charge of the Court, upon actual and constructive notice, is assigned as error. Upon these points the Court charged the jury as follows: "By actual notice is meant that, if there was a defect in the sidewalk, and some member of the Board of Mayor and Aldermen, or some agent or employe of the defendant whose duty it was to keep, or see the streets were kept, in repair, saw it, or that some one notified or informed them or some of them of its existence."

The Court charged as to constructive notice as follows: "By constructive notice is meant that, if there was a defect in the sidewalk, and that the

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defect was so patent and obvious as to be generally noticed by persons passing over it, and this continued to exist for such a length of time prior to the time of the alleged accident as that it might be reasonably inferred that some member of the Board of Mayor and Aldermen, or employe of defendant whose duty it was to keep the streets in repair, had notice of such defects."

The Court further charged the jury that "if the proof should show that the sidewalk, where Mrs. Pool was hurt, was originally put down in a defective condition, and so remained in that condition from the time it was first put down until Mrs. Pool was injured, then no notice, either actual or constructive, was necessary to defendant; for, if thus defectively constructed, the defendant would be charged with notice from the time of its original defective construction."

The charge of the Court as to actual and constructive notice is correct, and he properly defines same, and explains it in a plain manner to the jury, so that they can easily understand it. On these points the charge is an apt statement of the law on the subject, and is well supported by principle and authority, as is also the charge as to original defective construction of the sidewalk. He tells the jury that if the sidewalk was originally put down in a defective condition, and so remained in that condition from the time it was first put down until Mrs. Pool was injured, then no notice, either actual or constructive, was necessary to defendant;

for, if thus defectively constructed, the defendant would be charged with notice from the time of its original defective construction. This is certainly correct, and is the law.

The fifth and last assignment of error is based upon the refusal of the Court below to give the special instructions as requested by the plaintiff. The charge of the Court is very full and comprehensive, covering fully the entire case, and is a fair and correct exposition of the law governing the case, leaving to the jury to pass upon the facts, applying the plain rules of law as laid down by the Court to the facts of the case. Most of the special requests, at least those at all applicable to the facts of the case, had already been embraced in the charge of the Court. The others, for obvious reasons, should not have been given.

It is unnecessary to discuss the evidence. This was a matter for the jury to weigh and consider. This they have done. The plaintiff, upon a full, fair, and correct charge of the Court, and without error in the admission or rejection of testimony, has submitted her case to a jury, and they have found the issue joined in favor of the defendant. She has had a fair and impartial trial, and the jury has returned a verdict in favor of the defendant, which verdict is well supported by the evidence. All of the assignments of error of plaintiff will be overruled.

There is no error in the record, and the case will be affirmed, with costs.

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117	541

PETERSON v. RICHMAN.

(Jackson. June 29, 1893.)

MARRIED WOMAN. *Title-bond for her separate estate valid without privy examination, when.*

A bond for title by a married woman and her husband, to land conveyed to her for her sole and separate use, "with full power and authority as a *feme sole*" to covey it in any manner, is valid, although there was no privy acknowledgment by her.

Case cited and approved: *Sherman v. Turpin*, 7 Cold., 382.

Cited and distinguished: *Jarnigan v. Levisy*, 6 Lea, 400; *Wright v. Dufield*, 2 Bax., 218; *Moseby v. Partee*, 5 Heis., 30; *Robinson v. Queen*, 87 Tenn., 445.

 FROM SHELBY.

Appeal from the Chancery Court of Shelby County. W. D. BEARD, Ch.

L. W. HUMES for Peterson.

W. W. GOODWIN for Richman.

MCALISTER, J. This bill is filed by the next friend of Isabella Peterson, a minor, to recover the possession of a lot in the city of Memphis, which formerly belonged to Annie E. Peterson, the mother of the infant complainant. The specific ground of the relief asked is, that the said Annie

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E. Peterson, while a married woman, executed a title-bond to this lot, which was also signed by her husband, Nelson Peterson, *but without any privy acknowledgment by the wife*. The said Annie E. Peterson acquired this lot by purchase from one Martin Parker, who executed to her a warranty deed. The *habendum* clause of the deed is, viz.: "To have and to hold to the said Annie E. Peterson, her heirs and assigns, forever, and for her sole and separate use, benefit, and behoof, free from the debts, contracts, control, or liability of her present or any future husband, and *with full power and authority*, as a *feme sole*, to sell and mortgage, devise by will, or convey in any manner she may see proper."

On June 19, 1886, Nelson and his wife, the said Annie E. Peterson, executed an instrument to Nels. Johnson, which, although inartificially drawn, was, in reality, a bond for title to this land. It commences with the recital that this document is to show that "we, Annie E. Peterson and Nelson Peterson (her husband), have agreed to sell to Nelson Johnson," describing the lot. The consideration is expressed, and further on the instrument recites, viz.: "Now, it is understood that, should Johnson pay these notes at maturity, we agree to make to him, or as he may direct, a deed to said premises." This instrument is signed by Nelson Peterson and his wife, the said Annie E., but there was no privy examination of the wife, and, for this reason, it is insisted by complainant's counsel that the instrument is void.

In the case of *Jarnigan v. Lerisy*, 6 Lea, 400, this Court, speaking through Judge Freeman, said, viz.: "We have repeatedly held that the wife could not bind herself by title-bond, nor could such an obligation be enforced against her."

An examination of this case will show that the land conveyed was a part of the general estate of the married woman, and her conveyance was made without any privy examination.

The next case cited is *Wright v. Dufield*, 2 Bax., 218, in which it is said "a title-bond, though duly executed and certified in every respect, is insufficient to pass the title of a married woman in land. Her title can be divested only by the joint deed of herself and husband, executed in compliance with the forms prescribed by law."

This was also a case in which the land conveyed by title-bond was the general estate of the married woman.

In the case of *Moseby v. Partee*, 5 Heis., 30, this Court said, viz.: "The next error assigned is that, as M. C. Partee was a married woman when she executed her title-bond, her act was a nullity, and that the decree divesting the title out of her was erroneous. This presents the question whether, under the laws of Tennessee, a married woman can enter into a binding contract to convey her lands at a future time, and upon the performance of specific conditions by the other contracting party. The Court said there is a wide difference between a deed for land and a title-bond. The

one is the evidence of an executed contract; the other is the evidence of an unexecuted contract. The former is evidence that a sale has been made; the latter that a sale is to be made. The one is a sale, and the other a contract for a sale." It was accordingly held in that case that a married woman cannot bind herself to convey her estate of inheritance by title-bond, although her husband joined in the execution of the instrument, and the privy examination of the wife was regularly taken.

None of those cases are to be assimilated to the case at bar, but they are all to be differentiated in this important particular, that here the deed of settlement expressly confers upon the married woman, Mrs. Annie E. Peterson, a technical separate estate, with full power and authority as a *feme sole*, to sell and mortgage, devise by will, or convey in any manner she may see proper. This distinction was recognized by this Court in the case of *Sherman v. Turpin*, 7 Cold. It appeared in that case that a lot in the city of Memphis was, by deed, conveyed to Christiana B. Turpin, wife of M. H. L. Turpin, to her sole and separate use, and with power to her, at her pleasure, to sell, convey, devise, or otherwise dispose of the same when she may see proper, as fully as if she were a *feme sole*. It was claimed in that case the deed was void, for the reason that it was executed by the married woman alone, without the joinder of her husband, and certificate of privy acknowl-

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edgment as required by law in case of the deeds of married women. This Court, speaking through Judge Andrews, said, viz.: "A married woman may have, in regard to the disposition of her separate estate in lands, the full powers of a *feme sole*, if so expressed in the instrument creating the estate. Conveying as a *feme sole*, under the power conferred by the settlement, her privy examination as a *feme covert* becomes unnecessary. This necessarily follows, and is so held in England, under the statute for the abolition of fines and recoveries."

In the case at bar it will be remembered the husband signed the deed, but there was no privy examination of the wife. It has been supposed that the case of *Robinson v. Queen*, reported in 87 Tenn., is in conflict with the views herein expressed. In that case it was held that, under the Act of 1869-70, a married woman owning a separate estate, *where there is no restriction upon her power*, is authorized to convey such estate without her husband joining in the deed, but such conveyance would not be valid unless her privy examination is taken before a Chancellor or Circuit Judge, as provided in the second section of said Act, carried into the Code (M. & V.), § 3347. It will be observed, in that case the Court was dealing with the powers of a married woman with a separate estate, where her power of disposition was not withheld in the deed of settlement, which is an entirely different question from that presented in the case at bar, in which the married woman

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is expressly authorized to convey as if she were a *feme sole*.

In *Robinson v. Queen*, Judge Fowlkes referred to the fact that the marriage contract in that case did not, in terms, give the married woman the right to convey as a *feme sole*, and in this respect he distinguished that case from the case of *Sherman v. Turpin*, 7 Coldwell.

We think the case at bar is controlled by the decision of the Court in *Sherman v. Turpin*, and there is nothing in *Robinson v. Queen* that militates against this view. It having been determined, then, that Mrs. Peterson, under her deed from Parker, was clothed with full power of disposition as a *feme sole*, it is wholly immaterial whether that power has been exercised in the form of an executed contract, as by deed, or whether her contract is simply executory, as in this case, in the form of a bond for title.

Affirmed.

Public Ledger Co. v. Memphis.

PUBLIC LEDGER Co. v. MEMPHIS.

(Jackson. June 30, 1893.)

INJUNCTION. *Of municipal corporation.*

Injunction does not lie to restrain a municipal corporation from executing a contract, made with a newspaper owner without advertising for bids, to insert its advertisements, notices, and other printing in his paper for one year, to be paid for by the line, square, or column, and in no event to exceed a stipulated amount, under a provision in its charter that, before entering into any contract for any purpose, the Commissioners shall advertise for bids.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
W. D. BEARD, Ch.

THOS. M. SCRUGGS for Public Ledger Co.

METCALF & WALKER for Memphis.

SNODGRASS, J. The bill in this cause shows that the Board of Fire and Police Commissioners of Memphis "awarded a contract to do the public printing of the city (advertising, publishing ordinances, etc.) to the Scimitar Publishing Company for one year, at a price not to exceed by more than \$450 the price paid for public printing the year preceding, and were about to enter into the

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contract so awarded, and would do so unless enjoined;" and that complainant was a property owner and tax-payer of the city, and had the right to enjoin the execution of such contract as illegal. The illegality of the contract was predicated upon alleged violation of the following provision in the Act creating the Taxing District of Memphis:

"The said Fire and Police Commissioners shall in every case, before entering into any contract for any purpose, advertise daily, for one week or more, for such proposals for the work to be done, the material to be furnished, or the service to be performed, and shall open all the bids on the day named in the advertisement in the presence of a quorum of not less than three of the members of said Board of Public Works, and shall enter such bids, with the names of the bidders, in a book to be kept for that purpose, which book shall at all times be open to the inspection of the tax-payers; and every bid shall remain open for at least one week for canvass and discussion, after the opening, before any contract shall be awarded upon it; and after that time the award shall be made, if at all, to the lowest responsible bidder, who shall in all cases be required to give ample bond and security for its performance; the bond and security to be approved by the Supervisors of Public Work and Fire and Police Commissioners, who sign the contract."

It is averred that the defendant advertised for bids as follows:

“Sealed proposals will be received by us until Thursday, March 10, 1892, at 12 o'clock m., for the following work to be done, service to be rendered, or materials to be furnished the city of Memphis, Shelby County, Tenn., for the current year 1892, viz.: For publishing in a daily paper all orders, ordinances, notices, and public advertisements of the city of Memphis as they may be passed or ordered. All bids must be labeled ‘Bids for Public Printing,’ and must be accompanied by a certified check on some solvent bank for the sum of (\$250) two hundred and fifty dollars, which check will be returned to the bidder after the award of contract and execution of same. All bids for public printing to be in accordance with the conditions of the resolution passed by the Legislative Council on February 18, 1892, which is as follows: ‘That in advertising for proposals from daily newspapers for making publications of notice during the year 1892, the Secretary be instructed to require from publishers a sworn statement of paid circulation by carriers in the city, week to week, for three months, ending February 1, 1892; said statements to be subject to verification by other publishers bidding, if desired by this Council, the contract to be awarded to the newspaper showing the largest daily average on this basis for the period mentioned, the rate to be paid to be the same as that fixed by law for the publication of regular legal notices, such as are published by

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the various Courts of the State.' The Board reserves the right to reject any and all bids.

"By order of the Board.

"W. L. CLAPP, *President.*"

"Attest: JOHN J. SHEA, *Secretary.*"

Complainant states that no advertisement was made for bids under this provision of the law other than that set out; that such advertisement is not in accordance with the statute, and no contract could be properly made under it, and none was awarded under it, but the Legislative Council of defendant city, recognizing this, repealed the resolution embodied in the same, and thereupon awarded the contract for public printing without any advertisement whatsoever, and in violation of law.

Complainant states that, in response to said publication, the Scimitar Publishing Company filed its affidavit as to circulation; that no other newspaper filed any affidavit or made any statement as to its circulation; that thereupon the defendant, by vote, repealed the resolution of February, 1892, hereinbefore set out, and awarded the contract for public printing to the Scimitar Publishing Company, as before stated.

The injunction was granted, but, on motion, it was dissolved, and the bill dismissed. Complainant appealed, and assigns errors.

The decree is correct. Not denying the right of complainant as a tax-payer to enjoin defendant from the execution of an illegal contract, if it

would or might result in irreparable injury (*Lynn v. Polk*, 8 Lea, 121), no such case is presented here as calls for the intervention of a Court of Equity by the extraordinary process of injunction. The contract, as alleged, could, at most, be void, and not enforceable against the city, and, in no event, could complainant, as a tax-payer, be therefore injured or affected. The remedy by injunction to prevent municipal corporate action, is one not lightly to be applied. If the matter complained of is one merely of simple contract of no serious moment, and which may be defeated by resistance to its enforcement, even by the body making it, there is no sufficient ground for use of the writ at the instance of the tax-payer.

In this case, too, there is no manifestly illegal contract shown. The terms in which that contract was made are not set forth. It does not appear that the city authorities have agreed to pay any large or small sum in gross for a whole year's work. For aught that appears here, the Board may have merely designated the Scimitar Publishing Company as the newspaper owner in whose publication it proposed to insert its advertisements, notices, etc., for one year, and agreed or contracted with them that printing thus done should be at so much per line, square, or column, but in no event to exceed by four hundred and fifty dollars the cost of the preceding year.

The effect of all this, or other equivalent form of contract, would amount to no more than designating

a paper in which these things would be published, and limiting the price for the work when done.

Against such an arrangement as this, the statute is not directed. Each advertisement for bids must necessarily be made without a previous advertisement for terms, for the contracts which do require preliminary advertisement cannot be contracts for such advertisement.

Therefore, as to all advertisements which the city is to make under this provision, it is manifest that the Board had the legal authority to contract for them. As the legal duty of making other publications, as notices and ordinances, devolves upon it also, it is equally clear that it might publish each one without preliminary advertisement for bids upon its printing. The terms used in reference to contracts, included in a proper construction of the Act, forbid the idea that reference was had to each item of printing which the city might need. The delay of such a proceeding is not contemplated, nor the expense, for often the advertisement for bids would be as expensive as the advertisement of a notice or an ordinance for the printing of which bids were solicited.

These things were not in contemplation of the law-makers in the elaborate and important provisions made to restrain the power of the board to make contracts. The contracts referred to were such as would bear some reasonable proportion to the care taken to prevent their execution, except upon terms enacted. If the city could contract

for each advertisement and each notice and each ordinance or separate piece of printing, without advertising for bids, it could, for the same reason, designate one newspaper to publish all, and that without advertisement. With the policy of doing this upon any particular basis—as upon certificate of circulation or other ground—the Courts have nothing to do. Circulation might be a factor in the value of the publication, which should be taken into consideration in estimating good to be derived from it; but we do not undertake to say that upon this or any other theory the Board could absolutely bind the city by a contract for a stipulated sum, to be paid in gross, for a year's work, or that it could bind the city at all by such contract or any other of that duration and importance, except in the manner provided in the law quoted, after such advertisement as therein contemplated. All we do undertake to decide is that, as each item of the work might have been contracted for separately, without advertising, and the paper in which they were to be published might have been designated in advance or at time of each publication by the board, that equity would not enjoin any contract it had made which did not affirmatively appear to have affected other or more than this, even where there was a necessity for its intervention at the instance of a tax-payer not here existing.

The decree is affirmed with costs.

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***C. F. SIMMONS MEDICINE CO. v. MANSFIELD DRUG CO.**

(*Jackson*. June 30, 1893.)

1. CHANCERY COURT. *Complainant must have clean hands.*

It is a maxim of Courts of Equity, applicable in the consideration of cases brought to prevent the unlawful infringement of trade-marks or unfair competition in business, that the complainant seeking the Court's interposition in his behalf must come with clean hands; and that he will be repelled at the threshold of the Court, if it appear from the case made by him, or by his adversary, that he has himself been guilty of unconscientious, inequitable, or immoral conduct, in and about the same matters whereof he complains of his adversary, or if his claim to relief grows out of, or depends upon, or is inseparably connected with his own prior fraud. (*Post*, p. 94.)

Cases cited: 8 Sim., 477 (R. Cox, 640); 2 Sandf. Ch. Rep., 662 (R. Cox, 72); 19 How. Pr., 567 (R. Cox, 287); 5 Phila., 464 (R. Cox, 307); 108 U. S., 28; 33 La. Ann., 946; 8 Mo. App., 277.

2. SAME. *Same. Defense good without pleading.*

And this defense is available without pleading. (*Post*, pp. 98, 99.)

Cases cited: 13 How. Pr. R., 38 (R. Cox, 180); 128 Mass., 477.

3. TRADE-MARK. *Conduct that will not repel complainant seeking to restrain unlawful infringement.*

Issuance of a large number of copies of a single false circular, eight years before an action to restrain the use of a certain package for sale of medicine is brought, and forty years after the business is established, is not such deception as will disentitle the plaintiff to relief. (*Post*, pp. 93, 94, 99, 100.)

Case cited: 14 Blatch., 262.

* There is a note fully reviewing the authorities on the question of the invalidity of a deceptive trade-mark published with the case of *Joseph v. Macowsky* (Cal.), 19 L. R. A., 53.—REPORTER.

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4. SAME. *Same.*

A statement on a package of medicine: "Trade-mark registered, consisting of name, picture, and autograph," in a designated year, in which there was no provision for registration of trade-marks, by one who had filed a book title in that year showing his connection with the business, is not such a misrepresentation, when made without fraudulent intent, as will disentitle him to relief in an action to restrain the use of a similar package. (*Post*, pp. 94, 100-102.)

5. SAME. *Same.*

A statement on a package of medicine that "this is the original and only genuine Simmons' Liver Medicine," when made in good faith, will not disentitle one to relief in an action to restrain the use of a similar package, although there are other preparations from the original formula, if they are known under another name. (*Post*, pp. 94, 102-105.)

6. SAME. "*Simmons' Liver Medicine*" is not.

The use of the term "Simmons' Liver Medicine" cannot be appropriated by one person as a trade-mark, where it has become merely descriptive of medicine prepared under an original formula, and used by many people in connection with such medicine. (*Post*, pp. 118, 119.)

Cases cited and approved: 138 U. S., 537; 13 Wall., 311; 52 Wis., 572.

7. UNFAIR COMPETITION IN BUSINESS. *Enjoined, when.*

The use of a package for medicine so closely resembling that already appropriated by another as to deceive an ordinary observer, and employed for that purpose, will be enjoined, although the differences between them are readily seen when they are placed side by side. (*Post*, pp. 119-146.)

Cases cited: 39 Fed. Rep., 777; 2 Keen, 213; 2 Bos., 1; 81 Ky., 75; 23 Fed. Rep., 275; 26 Fed. Rep., 410; 24 Fed. Rep., 149; 7 Beav., 84; 138 U. S., 537; 43 Fed. Rep., 800; L. R., 41 Ch. Div., 35-50; 139 U. S., 540; 10 Fed. Rep., 838.

8. LACHES. *Does not bar account for infringement of trade-mark, when.*

A delay of one year to begin an action to restrain the use of a package for medicine as an infringement of the plaintiff's trade-mark, is not such laches as will disentitle him to an accounting, especially where he made immediate complaint thereof. (*Post*, pp. 146, 147.)

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Cases cited: 6 L. R. A., 824; 20 Fed. Rep., 217; 27 Fed. Rep., 24;
96 U. S., 245.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
W. D. BEARD, Ch.

TAYLOR & CARROLL, LEE & ELLIS, PHILLIPS,
STEWART & CUNNINGHAM for Complainants.

GANTT & PATTERSON and TURLEY & WRIGHT for
Defendants.

M. M. NEIL, Sp. J. Prior to the year 1840, one A. Q. Simmons, a farmer in Walker County, Georgia, having come into possession, in some manner not clearly disclosed by the proof, of a secret formula for the making of a valuable liver medicine, was accustomed to prepare it in small quantities for use in his own family and in the families of his neighbors. It does not satisfactorily appear that he made any for sale.

In 1840, or about that time, one M. A. Simmons, a young physician, and son of A. Q. Simmons, being at his father's house, they conceived the idea of preparing the medicine together for market. The two together made up the first lot of it for sale, M. A. Simmons, with his father's assistance, writing the first prescription or direc-

tions. This first lot was made in liquid form, and put in a five gallon keg, and carried through the country in a buggy, and retailed in quantities to suit the purchaser, by M. A. Simmons and his father. After making a few trips like this through the country, M. A. Simmons decided to return to his home in Dade County, Georgia, where he had previously begun the practice of medicine, and it was agreed between him and his father that they would make and sell the medicine separately, the father operating from his home and the son from his. The father continued to manufacture and sell this medicine from Walker County, Georgia, until the year 1856, when he moved to the State of Texas, and there died in the year 1862. About the year 1842, the son, Dr. M. A. Simmons, moved to the State of Mississippi, and there continued the manufacture and sale of the medicine. He advertised the medicine considerably both in newspapers and almanacs, calling attention to his own and his father's make. It does not appear that A. Q. Simmons ever advertised to any extent, if at all, separately from the advertisements prepared and put forth by Dr. M. A. Simmons. At this early date the medicine put forth by Dr. A. Q. Simmons (he having acquired the title in the manufacture of the medicine), was labeled thus: "Liver Medicine by A. Q. Simmons," all in print. That put forth by Dr. M. A. Simmons was labeled thus: "Liver Medicine by M. A. Simmons," the name being written in script.

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On the eleventh day of November, 1843, Dr. M. A. Simmons deposited in the Clerk's office of the District Court of the United States for the District of West Tennessee, the title to a book, as follows: "Dr. Simmons' Vegetable Liver Medicine, prepared solely by A. Q. Simmons & Son, Walker County, Ga.," and obtained a certificate in his own name of this fact. In the year 1850, he began to use a label, consisting of his picture and autograph, and the name, "Dr. Simmons' Vegetable Liver Medicine," and a statement of the ailments for which it would be found useful.

On the seventeenth day of October, 1856, Dr. A. Q. Simmons gave to his son, C. A. Simmons, a paper-writing, authorizing him to "make all my medicines, and to use my name in preparing, selling, and advertising all of my medicines," etc., A. Q. Simmons having been the manufacturer of other medicines also, besides the "Liver Medicine." Immediately after this authority was given him, he began to manufacture under it, and manufactured and sold under it continuously, except for a short period during the Civil War, when he could not get the material, down to 1868. From 1856 down to 1865, he called his preparation "Dr. C. A. Simmons' Liver Medicine," but in 1865, he gave it the name, "Dr. Simmons' Liver Regulator," and sold it in that name until 1868.

On the thirtieth day of September, 1868, C. A. Simmons sold his certificate, together with a knowledge of the formula for the making of the liver

remedy, to defendants, J. H. Zeilin & Co. After their purchase, and during the year 1868, they added to the name of the preparation the words "or medicine," and on the tenth day of December, 1868, in the District Court of the United States for the Southern District of Georgia, "deposited the title of an engraving," consisting of a label containing the words, "Dr. Simmons' Liver Regulator or Medicine," with a statement of the diseases for which the remedy was thought to be useful, and the words, "A strictly vegetable, faultless family medicine, prepared only by J. H. Zeilin & Co., Macon, Ga."

In 1868 or 1869, after Zeilin & Co.'s purchase, Dr. M. A. Simmons changed his label so as to read, "Dr. M. A. Simmons' Vegetable Liver Medicine," the change consisting in the insertion of the initials "M. A." to distinguish his preparation of the remedy from that of Zeilin & Co.

On November 1, 1870, Zeilin & Co. registered in the patent-office at Washington, a "wrapper or label or a trade-mark for said medicine," being an exact copy of that previously filed in the United States District Court for the Southern District of Georgia. It should be noted, however (a fact not previously mentioned), that both of said wrappers also contained the following caution: "Owing to the imitations and counterfeits of this valuable medicine, we are compelled, at a great expense, to change to this style of wrapper. None genuine without it, and the signature of A. Q. Simmons," the name of J. H. Zeilin & Co. being written in

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red ink across the face of this "caution," and below it their monogram in red ink. Each label also contained, at the top, a triangular shaped space inclosed in black lines, to be folded over the top of the package, and in this space the words, "Directions inside for preparation and use," and a similar triangular space at the bottom, to be folded over the bottom of the package, and in which were printed the words: "Entered, according to Act of Congress, in the year 1868, by J. H. Zeilin & Co., in the Clerk's office of the District Court of the United States for the District of Georgia."

On March 10, 1874, Dr. M. A. Simmons registered his trade-mark in the patent-office at Washington, with the following specifications: "My trade-mark consists of the words, 'Dr. Simmons' Vegetable Liver Medicine' placed on a label above a portrait of myself, and a fac-simile of the signature, 'M. A. Simmons, M D.,' on the lower part of the label at the right hand, as represented in the accompanying drawing," said drawing being a duplicate of the label upon his tin can packages in use in 1850. He continued however, in actual use the variation of this form introduced by the insertion of the initials "M. A.," the actual name appearing on all the packages being "Dr. M. A. Simmons' Vegetable Liver Medicine." And it has also been most generally advertised by this name, both by him and his successors in title, but very often by the name "Dr. M. A. Simmons' Liver Medicine."

On the seventeenth day of May, 1881, J. H. Zeilin & Co. registered in the patent-office at Washington, an addition to the "trade-mark," consisting of a device representing a mortar and pestle crossed by a scroll or ribbon, in the form of the letter "Z," one end of which embraces a spatula and the other end a graduate. On the several limbs of this symbol are arranged the words "A. Q. Simmons' Liver Regulator." And on the twenty-fourth day of May, 1881, they registered, also in the patent-office at Washington, a claim to the exclusive use of the word "Simmons" as a "word-symbol," claiming that it had "lost its original signification, and become a purely arbitrary term, indicating origin and ownership, by pointing to us as the manufacturers of the genuine preparations." They have continued this form of label down to this time, the "Z" being a large, red letter on the front face of the label, and the words, "A. Q. Simmons' Liver Regulator," being in white letters, on the limbs of said red letter Z.

Up to 1878, Dr. M. A. Simmons manufactured his medicine principally at Iuka, Mississippi, but in that year moved to St. Louis, Missouri, where he prosecuted the business until 1879, when he sold to Simmons & Hayden, his business, including his "trade-mark," cuts, dies, and labels, and thence the said business, "trade-mark," cuts, dies, etc., passed by proper transfers to the complainant, "C. F. Simmons Medicine Company," which has

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been conducting the business in St. Louis ever since. J. H. Zeilin & Co. began the business of manufacturing their "Regulator or Medicine" in Macon, Ga., but in 1872 removed to Philadelphia, Penn., and after that time did business continuously at Philadelphia, until they transferred their business to "J. H. Zeilin & Co., Incorporated," a corporation chartered under the laws of the State of Pennsylvania, which corporation has since been carrying on the business at the same place, and has been brought into this case by supplemental bill, and answers, assuming all responsibility connected with this litigation.

Within a few months after J. H. Zeilin & Co.'s purchase from C. A. Simmons, a fierce rivalry sprang up between that concern and Dr. M. A. Simmons, and has been continued by them and their successors, down to this time. This warfare has been waged in newspapers and circulars, and has been very bitter and mutually abusive. It would serve no good purpose to go into this matter more particularly. Suffice it to say, that neither has secured much advantage over the other in the use of hard names and injurious epithets.

The culmination of this rivalry and bitterness was the present litigation. On the twenty-third day of January, 1891, the complainant filed its original bill against J. H. Zeilin & Co., I. L. Corse, T. F. Cheek & Co., and the Mansfield Drug Co., in which bill, among other things disposed of by the Chancellor and not appealed from, and hence

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not necessary to notice here, they sought to restrain the defendants from vending a certain package known in this record as the "Cheek package," and for a destruction of the labels, packages, devices, etc., connected therewith, and for an account of profits. To this bill the defendants, filed their answer and cross-bill; and in said cross-bill defendants asked that complainants in the original bill be restrained from using a cartoon of like form and size to that used by complainants in the cross-bill; that complainants in the original bill be restrained from using red or reddish gold borders within slight black lines on its package; that it be restrained from using red tablets or reddish gold tablets across its packages; that it be restrained from using triangular shaped flaps on the ends of its packages, bounded by broad red or reddish gold lines, inclosed in slight black lines; that it be restrained from using the words, "full directions inside," within the triangular shaped flap at the bottom of its packages; that it be restrained from putting any matter within the triangular shaped flap on the top of its packages; that it be restrained from putting up its medicine in liquid form; and for an order of reference to ascertain the amount of damages which complainants in the cross-bill may have sustained by reason of the infringement of their trade-mark rights.

But before proceeding to a consideration of these matters, it is necessary to first dispose of a preliminary question made by the defendants. It is

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said that the complainants do not come into Court with clean hands, and should be therefore repelled at the threshold of a Court of Equity, because the proof shows that complainants had put out a circular, entitled "Humor and Facts," and sent it broadcast to the trade, in which circular the claim was made that Dr. M. A. Simmons was the discoverer of the remedy; also because the triangle on top of complainants' packages contains the following: "Trade-mark registered, consisting of name, picture, and autograph, November 11, 1843;" and also because each package issued by the complainants contains the following statement, viz.: "This is the only original and genuine Simmons Liver Medicine."

The principle is general, and is one of the maxims of the Court, that he who comes into a Court of Equity asking its interposition in his behalf, must come with clean hands; and if it appear from the case made by him, or by his adversary, that he has himself been guilty of unconscientious, inequitable, or immoral conduct, in and about the same matters whereof he complains of his adversary, or if his claim to relief grows out of, or depends upon, or is inseparably connected with his own prior fraud, he will be repelled at the threshold of the Court. Some applications of this principle to the special class of cases we have under consideration, will be seen in the following excerpt, taken from Browne on Trade-marks: "Where a complainant had in his advertisements made a num-

ber of false representations to the public, with respect to the origin, composition, and value of the tea bearing his trade-mark, an injunction was refused until he had established his right at law, Vice Chancellor Shadwell saying, 'It is a clear rule laid down by Courts of Equity, not to extend their protection to persons whose case is not founded in truth.' The rule applies when one has made misrepresentations in show cards; or made false statements as to the qualities and properties of his merchandise, as in selling a medicine misnamed 'Balsam of Wild Cherry,' or a toilet compound the labels of which contained untrue statements and exaggerations, or a cosmetic called "The Balm of Thousand Flowers," though the compound was not derived from flowers, or "Laird's Bloom of Youth or Liquid Pearl," when the so-called article contained carbonate of lead or other noxious ingredients, although the manufacturers described it as being free from all mineral and poisonous substances; or improperly represented that "Schnapps" is not merely a spirit, but also a medicinal preparation; or sold a so-called "Hop Essence" for the purpose of enabling brewers to supply to the public a liquid which they might represent as made with pure hops, which was not the truth; or made false representations of the origin and value of the plasters, the word "Capeine" being shown to be quite unknown, and not to imply any such qualities as were described by the plaintiffs; or falsely representing the place of manu-

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facture, as where the manufacturer of a skin powder, which he called "Meen Fun," falsely represented his American compound to have been made in England and patronized by the Queen; or misrepresented his cigars as having been made in Havana; or falsely denoted or indicated to the public, in the title of his merchandise, that the formula for his medicine was prepared in the East Indies; or untruly represented the place of origin as well as the manufacturer; or continued the name of a predecessor after he had ceased to be connected with the business. But it must be remembered that in all the above cases, fraud was a predicate. Where no actual or constructive fraud is shown, and no intention to harmfully mislead purchasers manifested by the use of instrumentalities that would naturally tend to that result, the rule does not apply." *Browne on Trade-marks*, Sec. 71; and see *Pidding v. How*, 8 Sim., 477 (R. Cox, 640); *Partridge v. Menck*, 2 Sandf. Ch. Rep., 662 (R. Cox, 72); *Hobbs v. Francais*, 19 How. Pr., 567 (R. Cox, 287); *Phalon v. Wright*, 5 Phila., 464 (R. Cox, 307); *Manhattan Medicine Co. v. Wood*, 108 U. S., 28.

So, where the question arose as to the untruthful use of the word "patent" or "patented," it is said: "In all the foregoing cases a fraudulent intention, or a tendency to mislead, was the ground of decision; but the untrue use of the word "patent," or an equivalent expression, does not necessarily disentitle to relief. Intent, or a tendency to mislead, is, after all, a question of fact, to be determined

by the circumstances of each individual case." *Ib.*, 87. And again: "In the Supreme Court of Louisiana it was held that the use of the word 'patented' must be with the purpose of deceiving the public, to be a valid objection; and if a fraudulent intention does not exist, and the use of the word may be explained in any reasonable sense consistent with truth and honesty, the party will not be prejudiced." *Ib.*, 88; *Insurance Oil Tank Co. v. Scott*, 33 La. Ann., 946; Price & Stewart, American Trade-mark Cases, 477. So, where the words adopted in the label as a trade-mark are substantially true, and contain nothing calculated to deceive the public, although not literally true, this was held to be a distinction without a difference, and not sufficient to repel the plaintiff. *Conrad v. Joseph Uhrig Brewing Co.*, 8 Mo. App., 277. The words complained of were, "Budweiser Lager Beer." "It is contended that the law can afford no protection to plaintiff, because his so-called trade-mark or label was in itself a misrepresentation. This beer, it is said, was not Budweiser beer. That it was not Budweiser beer in the sense that it was not made in Budweis is true. Neither was it imported beer. But it does not appear that it was held out to the public, either as actually made in Budweis or as a foreign article. The statement on the label explains that it was not made at Budweis, but by the Budweiser process. Whether there was anything peculiar to Budweis about this process or not, it seems that this beer was really made as

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beer made in Budweis—of the best barley and hops, and with the same preparation of mash. The label states that it was made of the best Saazar hop and imported barley. If this was not literally true, the testimony is that it was a distinction without a difference. Imported hops exclusively were used. There were frequently other hops, but they were always of the same excellent quality as Saazar hops, and of the same peculiar properties, and were always imported hops. The barley was not imported, but a select quality of American barley, equal to imported barley, was always used. There was no testimony tending to show any imposition upon the public by plaintiff. The testimony is that the public was furnished by him with an excellent quality of beer, made of imported hops, and of barley equal to any to be found in Europe or America.” *Ib.*; Price & Stewart, American Trade-mark Cases, 322.

It is true, as insisted by complainant, that this objection is not set up in defendant's answer in the case at bar. Nor was that necessary. In the case of *Fetridge v. Wells*, 13 How. Pr. R., 385 (R. Cox, 180), where this question arose in a similar case, said Duer, J.: “The remarks that I have now made would suffice for the decision of this motion, were the only question that of the similarity of the trade-marks, but there is another, and a grave and important question, to which the counsel for the defendants have earnestly directed my attention. That question is, whether, even upon

the supposition that all the material allegations in the complaint are true, the conduct and proceedings of the plaintiff and his firm have not been such as justly to preclude them from any claim to relief in a Court of Equity. This question, it is true, is not raised in the answer of the defendants, but it is raised by the facts which the affidavits and other papers before me have disclosed, and, in my opinion, it is emphatically the question that, as a Judge in equity, I am bound to consider and determine." And in *Connell v. Reed*, 128 Mass., 477, the fraud was first disclosed in the report of the Master upon the subject whether there had ever been a former use of the trade-mark in controversy, and when this report came in containing the information that the plaintiff had adopted and used the words, "East Indian," to denote and to indicate to the public that the medicines were used in the East Indies, and that the formula for them was obtained there, neither of which was the fact, the Court declined to entertain the proceedings further, saying: "Under these circumstances, to maintain this bill would be to lend the aid of the Court to a scheme to defraud the public." Price & Stewart, *American Trade-mark Cases*, 347. It is not, strictly speaking, a defense at all, but rather an interposition by the Court in behalf of the public, to discourage fraud and wrong upon the public.

Applying the rule above illustrated to the facts of this case, we think that there is no doubt that

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the statement made in "Humor and Facts," that M. A. Simmons was the discoverer of the medicine, or formula, being false, and being known to be false, and material, would disentitle complainants to any relief, if otherwise entitled, but for the fact that this statement was not made after the year 1883. It is certainly true, that where a business has been built up on the publication of a particular falsehood for a considerable time, as in *Seabury v. Johnson*, 14 Blatch., 262 (Price & Stewart, 29), the omission of such fraudulent and untrue language from circulars before bringing suit, will not relieve the plaintiff of the consequences of the previous wrong; but we do not think this rule should be applied to a single circular, issued in one particular year, eight years before suit brought, although a very large number of copies of that circular were issued in that year, especially in view of the fact that this publication occurred simply as one incident in a long career of a previously established business reaching back more than forty years.

As to the statement on complainant's packages, "Trade-mark registered, consisting of name, picture, and autograph, November 11, 1843;" while this was not and could not be true, we do not think that it was intended thereby to mislead the public as to any material matter, or that it did so mislead the public. This statement must be understood in the light of the controversies that have been waged between complainants and defendants for many years past. As soon as Zeilin & Co.

got possession of the formula from C. A. Simmons, and began the manufacture of their "Dr. Simmons' Liver Regulator or Medicine," a controversy sprung up as to who had the right to make the medicine. Zeilin & Co. claimed that, as assignee of C. A. Simmons, the only person, as they insisted, who had received authority from Dr. A. Q. Simmons, they had the sole right; M. A. Simmons insisted that he was one of the original proprietors. In this state of the case, M. A. Simmons thought it necessary to hold up before the public the fact of his early connection with the making of the medicine—that as far back as 1843, he had publicly asserted a proprietorship in the medicine. This he had in fact done by the filing of the book title, before referred to, November 11, 1843, under the copyright law, in the office of the Clerk of the District Court of the United States for the District of West Tennessee, and receiving from the Clerk a certificate in his own name, showing that he had so filed it, the title so filed being "Dr. Simmons' Vegetable Liver Medicine, prepared solely by A. Q. Simmons & Son, Walker County, Ga." The statement on the package is intended to call attention to this cardinal fact, the early connection of Dr. M. A. Simmons with the medicine as a proprietor, and, so understood, states the truth. The statement in other respects is wholly immaterial and unmeaning, because in 1843 there was no provision for registry of trade-marks, and the statement in this respect was merely the

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statement of an absurdity, and innocuous. The copyright law under which the so-called registration of 1843 was made, had no application to trade-marks, and gave them no protection. Browne, Trade-marks, Secs. 109-112. The first attempt by Congress to regulate the right in trade-marks, is to be found in the Act of July 8, 1870. Browne, Trade-marks, Sec. 280. Under this Act, Dr. M. A. Simmons did register his trade-mark, "consisting of name, picture, and autograph," in 1874, as before stated, and at the time said statement on his packages was first put forth, the registration allowed by that Act had been made. That Act was declared unconstitutional in 1879, by the Federal Supreme Court. Trade-mark Cases, 100 U. S., 82, 99. We do not think that the complainants should be repelled on account of said statement, for the reason that, so far as it contains any suggestion of untruth, it is immaterial, absurd, and innocuous.

As to the next statement upon complainant's package animadverted upon by the defendants, that: "This is the original and only genuine Simmons' Liver Medicine, the first that was ever advertised of that or any similiar name. Dr. M. A. Simmons advertised it extensively, peacefully, and alone for twenty-five years, before any of the others who are now making the different grades or imitations of it commenced. No other Simmons ever did so," etc. This is substantially correct in its statement as to advertisement, and the maintenance of the reputation of the medicine.

and as to its being original in the sense of being made from the original formula, and by one of the original proprietors, but it is not correct as to complainant's preparation being the only genuine preparation made from the original formula, because the proof makes it clear that the preparation made and sold by Zeilin & Co. is equally genuine with complainant's, in the sense of being made from the same original formula. Was this misstatement made fraudulently? We think not. However mistaken M. A. Simmons was in his opinion, the record shows that he honestly believed that, as one of the original proprietors, he was entitled to the secret of the preparation, and he alone after the death of his father in 1862. He always passionately denied the right of Zeilin & Co. to use the word "Medicine," making no objection to the use of the word "Regulator." He seemed never to be convinced of the fact that his father had communicated the formula to C. A. Simmons. He dwelt upon the fact that C. A. Simmons had sold what purported to be the original formula to one Guice, and that the medicine made up by Guice according to this formula had proven inert and worthless, and he argued from that, that Zeilin & Co., having purchased from C. A. Simmons, had gotten the same imperfect formula that he supposed C. A. Simmons to have. He even went so far as to offer in a letter to J. H. Zeilin himself, dated October 8, 1877, to teach him how to prepare the medicine correctly, when he

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and Zeilin were having some correspondence about the sale of M. A. Simmons' business to him. The letter runs thus: "Your favor of the third instant is here. Knowing your ignorance of the party addressed, I overlook the part which seems designed to intimidate, and come at once to the question, What is best for us to do? I have been for several years in hopes of getting into Court with you—would when you first commenced, but had no idea you could so completely undermine and get my business, until it was done. Then, you were in Philadelphia, too far for me to go so often annually, and probably so long to attend Court. Now, as proof that I am pursuing the proper course, it is successful. My business has been constantly increasing for several years, and I am satisfied that it will continue to increase. My prospects are better now than ever since your monopoly of newspapers. Yet, I prefer quiet and peace, and would like to rest from exciting business in my old age, therefore would sell to you—*learn you how to make it right*—quit it entirely, and run other preparations," etc. He and his successors also attached the greatest importance to the word "Medicine" in the title of their preparation, because it bore that designation as prepared under the original formula by M. A. and A. Q. Simmons when they made it up and sold it themselves, and the word "Medicine" in that connection had acquired in the minds of the people supplied by M. A. Simmons, a peculiar meaning, and appertaining

to the old medicine as originally prepared, and connecting it back with the old formula. So that when M. A. Simmons and his successors used the expression "original and only genuine Simmons' Liver Medicine," it bore in their minds, and was intended to convey two ideas, direct descent, so to speak, in formula and in name, from the ancient original; and this was honestly believed by them to be true. We cannot impute fraud on such a state of facts. We cannot hold this to be a deliberate purpose to deceive the public. This statement is not true in the sense of being the only genuine preparation from the original formula; it is true in the sense of being the only preparation, so far as the proof shows, that continues the ancient name with the ancient formula.

Recurring now to a consideration of the substantial rights of the parties in litigation in this case, we are brought to a discussion of the "Cheek" package and the rights predicated thereon. The antecedents of this package are as follows: T. F. Cheek, being a son-in-law of old Dr. A. Q. Simmons, and having gone with him to Texas, and there resided part of the time in his family, and part of the time a few miles distant, claimed to have received, in 1857, authority from Dr. A. Q. Simmons to make all of his medicines, and to use his picture as a protection against frauds and imitations. After the close of the Civil War, and about the year 1870 or 1871, Cheek decided to leave Texas and remove to Alabama or Mississippi.

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Before leaving Texas, he endeavored to purchase from A. Q. Simmons, Jr., the right to use his name in connection with the manufacture of the liver medicine. A. Q. Simmons, Jr., refused to comply with this request. Cheek then approached A. W. Simmons, another son of Dr. A. Q. Simmons, and for a consideration of fifty dollars secured from him permission to use his name in connection with the manufacture of said medicine. Thus armed, Cheek went to Iuka, Miss., where Dr. M. A. Simmons was engaged in manufacturing and selling the medicine. He suggested to Dr. M. A. Simmons that there should be a combination of all the heirs of Dr. A. Q. Simmons in the manufacture of the medicine. This was declined. He, however, manufactured a small quantity of the medicine on his own account, Dr. M. A. Simmons ordering the materials for him; and he, said Cheek, sold it in an inconsiderable quantity around the neighboring towns and country for a short time. About this time he registered his trade-mark in the office of the Librarian of Congress at Washington—a photograph of Dr. A. Q. Simmons; and on the thirty-first of December, 1872, having in the meantime removed to Birmingham, Ala., he deposited in the same office a print, entitled "Simmons' Improved Liver Medicine," and on December 4, 1877, he received a certificate from A. R. Spofford, Librarian of Congress, to the effect that he had deposited in that office a photograph of Dr. A. Q. Simmons, accompanying the certificate with the title, "Simmons'

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Improved Liver Medicine: By T. F. Cheek, of Birmingham, Ala." After he went to Birmingham, he there manufactured liver medicine and sold it in a small way, using a wrapper for his packages on one face of which appeared a picture of Dr. A. Q. Simmons—that is, a bust of him—with the words "trade-mark," one of these words appearing on each side of the picture. Above this picture was a notice of the entry in the office of the Librarian of Congress, before referred to, and under it the following: "The celebrity of Simmons' Liver Medicine and the constantly increasing demand, has induced sundry persons to counterfeit it. Hence, it becomes the duty and privilege of the heirs of Dr. Simmons to sustain and increase its usefulness by such improvements as are demanded by medical progress, and to secure accuracy in purchasing. Therefore, information is given that Simmons' Liver Medicine has been greatly improved, and hereafter every package will have the engraving of Dr. Simmons and signature of T. F. Cheek, to whom all orders and communications must be addressed, at Birmingham, Ala." On another face of said wrapper was the following: "Simmons' Improved Liver Medicine, a safe and effectual remedy for all diseases arising from a diseased state of the liver, such as chronic and acute inflammation of the liver, dyspepsia, bilious affection, dropsy, sick headache, costiveness, impure blood, jaundice, colic, loss of appetite, low spirits, despondency, flatulence, female weakness, and general debility. Warranted purely

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vegetable by A. W. Simmons & Co., heirs of Dr. A. Q. Simmons. Send all orders to T. F. Cheek, Birmingham, Ala." Another face of the wrapper contained a further list of ailments for which the medicine was said to be efficacious, and the fourth face contained the advertisement of Simmons' blood purifying pills.

In May, 1878, T. F. Cheek entered into an arrangement with E. G. Eaton and F. H. Eaton, under which the firm of T. F. Cheek & Co. was organized, to manufacture the liver medicine at Memphis, Tenn., with the reservation in his favor that he was to be allowed to carry on his own manufacture at Birmingham. This concern used a wrapper, upon one face of which appeared the following: "Dr. A. Q. Simmons, the original and genuine Vegetable Liver Medicine." Just under this was the picture of Dr. A. Q. Simmons, on each side of which was printed the word "trade-mark," and under the picture a fac-simile of the signature of Dr. A. Q. Simmons, then a notation of the entry in the office of the Librarian of Congress, and then these words: "A cure for all diseases of the liver, biliousness, dyspepsia, sick headache, loss of appetite, costiveness, etc. T. F. Cheek & Co., proprietors and manufacturers, Memphis, Tenn." The other three faces contain certificates, one of which purported to be made by A. Q. Simmons, setting forth the fact that he had given T. F. Cheek the right to use his picture. This concern continued in business until some time in the year

1881 or 1882; and in June, 1882, T. F. Cheek and his wife, Mary J. Cheek, transferred to one Thomas A. White all their interest in T. F. Cheek & Co., and all their individual interest in the formula for making the liver medicine, together with the trademark, cuts, dies, wrappers, etc.; and the same month the Eatons likewise sold all their interest in the said property to White, who soon thereafter transferred all these rights and properties, such as they were, to J. H. Zeilin & Co., defendants hereto, and the business of T. F. Cheek & Co. wholly ceased—that is, said T. F. Cheek & Co. ceased doing business when the sale was made to White. Matters remained in this condition until January, 1890, or about that time. About the date last named, J. H. Zeilin & Co. opened a business at Memphis in the name of T. F. Cheek & Co., the defendant, I. L. Corse, being manager. This business consisted of a wareroom, wherein was stored boxes of liver medicine of the manufacture of defendants, Zeilin & Co., done up in packages as follows: Contained in wrappers very closely resembling those used by T. F. Cheek in his business at Birmingham, but with the following differences: Immediately under the picture of Dr. A. Q. Simmons is the name of Dr. A. Q. Simmons in printed letters, and on the lower part of that face of the package the sentence in the original Cheek package, beginning with the word “therefore,” is changed so as to read as follows: “Therefore, information is given that Simmons’ Liver Medicine will have on every package

an engraving of Dr. A. Q. Simmons and name of T. F. Cheek & Co." On the back of the package in controversy the following changes are made from the original Cheek package: The word "improved" is left out, so as to make the top of that side of the label read, "Simmons' Liver Medicine," and upon the lower part of that side of the package the words, "T. F. Cheek & Co., Memphis, Tenn.," are substituted for the corresponding words, "T. F. Cheek, Birmingham, Ala.," on the original Cheek wrapper. On the third side of the package in controversy, there are substituted in place of the advertisement of Simmons' blood purifying pills on the original Cheek wrapper, the following words: "Liver Medicine, by A. Q. Simmons. The original, as made by old Dr. A. Q. Simmons in his life-time. A cure for all diseases of the liver, biliousness, dyspepsia, sick headache, loss of appetite, costiveness, colic, heart-burn, fever and ague, etc." The fourth side is exactly like the original wrapper used by T. F. Cheek. There is but little resemblance to the wrapper used by T. F. Cheek & Co., the old firm, composed of Cheek and the Eatons, the only substantial similarity being the picture of Dr. A. Q. Simmons. With regard to this package, complainants charge that it was manufactured and put up in its present form to sell to the customers of complainant, and to the trade known by defendants to be the territory in which complainants' medicines were sold; that it is a spurious, fraudulent, and sham preparation of a liver medicine, purporting

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upon the label and wrapper containing said medicine to be the genuine "Dr. Simmons' Liver Medicine," and further showing by the printed matter upon said label and wrapper that the same was warranted as purely vegetable by "A. W. Simmons & Co., heirs of Dr. A. Q. Simmons," and stating that the same was made and sold from and at the city of Memphis, Tenn., by the firm of T. F. Cheek & Co., when, in fact, it is not so made or sold by said T. F. Cheek & Co., but that it is manufactured and labeled and sold by and for the account of J. H. Zeilin & Co. and their agents, for the purpose of injuring the trade and damaging the business of complainant, and of deceiving the public; and that the pretended warranty by A. W. Simmons & Co. is fraudulent and fictitious, there being no such firm as A. W. Simmons & Co. or T. F. Cheek & Co. in the city of Memphis or elsewhere; that the object of this device and plan was to palm off said package as complainants' goods; that there is neither upon said label or wrapper of said package any thing to indicate to or inform the public that defendants are in any manner identified with the manufacture or sale of said package; and that the said defendants, Zeilin & Co., have studiously avoided any identification or apparent connection with the said preparation, both for the purpose of not interfering with their own medicine, known as "Dr. Simmons' Liver Regulator or Medicine," and in order that they might more effectually injure complainants' business; that from a date long

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prior to 1868, and down to the present time, the liver medicine manufactured and sold by Zeilin & Co., and labeled as "Dr. Simmons' Liver Regulator or Medicine," has been known to the trade and consumers as "Liver Regulator" or "Simmons' Liver Regulator," the word "Medicine" being rarely used in connection with said preparation when speaking thereof or ordering the same; and that complainants' medicine, since 1840, has been generally known to the trade and consumers as "Simmons' Liver Medicine" or "Dr. Simmons' Liver Medicine" or "Simmons' Medicine," and that the words "Medicine" and "Regulator" have respectively been used and are used by the trade and by consumers to indicate which of the two preparations was and is wanted when called for, the word "Medicine" being used to identify complainants' liver medicine and the word "Regulator" being used to designate defendants' medicine; and that defendants, Zeilin & Co., well knowing these facts, had put upon the market said Cheek package in such a manner as would not injure the sale or detract from the price of their regulator, but that would come in direct competition with, and could be sold under calls or orders for complainants' "Simmons' Liver Medicine," and that said package had been put upon the market in that portion of the country where complainants' principal trade was at about one-half the price charged by Zeilin & Co. for their "Liver Regulator" and by complainant for its "Liver Medicine," and this reduction in price was made solely for the

purpose of damaging the trade and business of complainant, and to drive it out of the market; that all the packages of medicine manufactured by complainant and its predecessors in ownership contained, as one distinguishing feature of the wrapper thereof, an engraved portrait in black of Dr. M. A. Simmons, and that none of the packages of "Liver Regulator" manufactured and sold by defendants at any time contained on the wrapper thereof any picture of any person, but that they were characterized and designated by the name "Regulator" and by the large red "Z" on the front of each package thereof, but that on said Cheek package complained of there is a picture of Dr. A. Q. Simmons in black, placed upon the face of the label, of about the same size and of the same general appearance and in the same position relatively on the package or wrapper as the picture of Dr. M. A. Simmons on the packages made and sold by complainants, and that said picture was put upon said Cheek package by defendants, Zeilin & Co., to enable them the more easily to deceive the public and the consumers of complainants' medicine; that said Cheek packages are well calculated to deceive, and do deceive and entrap the unwary who call for "Simmons' Liver Medicine," manufactured and sold by complainants, the name, picture, and general appearance of the package deceiving them; and that defendants, well knowing this fact, have repeatedly filled orders with said Cheek packages, which orders called for "Simmons' Liver Medicine"

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or "Dr. Simmons' Liver Medicine," made by complainants; and that said defendants are now selling large quantities of said medicine put up in said Cheek packages to complainants' customers and to the trade in the territory where complainant is most largely engaged in selling its said "Simmons' Liver Medicine," and that by reason thereof complainant has been greatly injured.

Respondents, Zeilin & Co., deny all charge of fraudulent purpose in putting out said Cheek package, and deny that it is a spurious or sham preparation; admit that said medicine is not, in point of fact, manufactured in the city of Memphis, and say that it is manufactured in the laboratory of respondents in the city of Philadelphia, and that J. H. Zeilin is sole proprietor of both J. H. Zeilin & Co. and of T. F. Cheek & Co.; deny that said medicine is sold in said packages at Memphis for the purpose of injuring and damaging the business of complainant and of deceiving the public; deny that the warranty of A. W. Simmons & Co. is pretended, fraudulent, or fictitious, and state that they have the right to use the firm name of A. W. Simmons & Co. or T. F. Cheek & Co. in the city of Memphis or elsewhere; set forth the facts of their purchase from T. F. Cheek and wife and the Eatons substantially as hereinbefore stated, and say: "Having acquired the trade-marks of T. F. Cheek & Co., respondents concluded to put up their medicine in the wrappers and labels used by T. F. Cheek & Co. at Birmingham, the only difference

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being the substitution of Memphis, Tenn., for Birmingham, Ala., and sell their medicine through the Mississippi Valley, making Memphis the point from which the shipments were made. Accordingly, respondents, under the firm name of T. F. Cheek & Co., established a depot at Memphis, and have since conducted the business under the name of T. F. Cheek & Co. Respondents deny that the labels and wrappers in which said medicine is inclosed is any infringement whatever of the trade-mark rights of complainant. There is no resemblance whatever between the portrait of M. A. Simmons and A. Q. Simmons. The packages are not the same in color, and they bear no resemblance in color, and there is no probability of consumers being deceived in taking one for the other." That T. F. Cheek & Co. only sell said medicine in the form of powder and in twenty-five cent packages, and that respondents were induced to put up the medicine in this form because they could do so more cheaply than it could be put up in the form in which J. H. Zeilin & Co. sell their medicine, that is, their "Regulator;" and that the business of T. F. Cheek & Co. was intended to meet the demands of the trade in the Mississippi bottom, where the people are not accustomed to buying medicine in large packages; that the twenty-five cent package sold by T. F. Cheek & Co. was intended to meet the requirements of the negro trade in the Mississippi Valley; and that while the medicine is intrinsically as valuable as that of J. H. Zeilin & Co., it is put up

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in a cheaper package, and is therefore sold for less money without interfering with the business of J. H. Zeilin & Co. at Philadelphia. They state that T. F. Cheek put said medicine up in a package in all respects similar to the one now in controversy as far back as 1871, and prior to the time when the predecessors of complainant adopted the square package and before they had abandoned the use of a tin can for their medicines; and there is no resemblance whatever between the labels and wrappers in use by complainant and his predecessors at the time T. F. Cheek began business, and the labels and wrappers then adopted by T. F. Cheek and now used by T. F. Cheek & Co.; deny that the use of said firm name of T. F. Cheek & Co. is a fraud upon the complainant or that it was intended to palm off spurious goods put up by respondents and sold by said firm, to the injury of complainant; deny that the medicine so put up is spurious, but say that it is pure and of the best quality; admit that there is nothing on the packages containing the medicine of T. F. Cheek & Co. indicating that respondents are in any manner connected therewith, and insist that they have a right to do business in Philadelphia under the firm name of J. H. Zeilin & Co. and in Memphis under the firm name of T. F. Cheek & Co.; deny that they have avoided any identification with T. F. Cheek & Co., but say that, on the contrary, they have openly shipped the medicine from their laboratory in Philadelphia to their store-house in the city of

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Memphis, and that the defendant, Corse, who is a member of the family of J. H. Zeilin, has charge of the business; deny that the medicine is generally known by any particular appellation to all consumers, but say that it depends a great deal upon the locality as to what the public calls it—that among the more ignorant it is sometimes called “Simmons,” without the use of any other word, and that generally it is called “Liver Regulator,” and by some it is called “Liver Medicine;” that at various times since defendants began business various persons have used the words “Liver Medicine” in connection with the word “Simmons” in one form or another, and that for years they have been in litigation with first one and then another member of the family, and that a man by the name of Simmons, and not a member of the family, is selling a liver medicine in Texas, and uses the word “Simmons” as a part of his trade-mark, and that a man named Thedford is the manufacturer and vendor of “Simmons’ Liver Medicine” at Judson, Ga., and that all this has been brought about by means of the extensive advertising of respondents’ medicine, and that, consequently, to protect themselves, they having bought out T. F. Cheek & Co., as aforesaid, concluded to manufacture and put up in a cheaper package the medicine, and sell it in Memphis under the firm name of T. F. Cheek & Co., and under the trade-marks acquired, as aforesaid, from T. F. Cheek and Eaton. They deny that they have sold, and are now selling, large quantities of

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the medicine of T. F. Cheek & Co. to the customers of complainant, or that they ever damaged complainant in any respect, but say they are selling the medicine to their own customers, and are doing what they can to build up a fair and legitimate business.

The complainant is not entitled to any relief on the ground of infringement of its trade-mark, as such, technically considered. The right to acquire property in a trade-mark, by the use upon vendible commodities of some mark, symbol, sign, or word susceptible of being used as such, is a common law right, and the property so acquired is always protected by Courts of Equity in a proper case. The object and purpose of a trade-mark is to indicate by its meaning or association the origin or ownership of the article to which it is applied, so that the manufacture or product of the owner of same may be readily recognized in the market. "This may, in many cases, be done by a name, a mark, or device well known but not previously applied to the same article. But though it is not necessary that the word adopted as a trade name should be a new creation never before known or used, there are some limits to the right of selection. * * * No one can claim protection for the exclusive use of a trade-mark or trade name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be de-

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stroyed. Nor can a general name, or name merely descriptive of an article of trade—of its qualities, ingredients, or characteristics—be employed as a trade-mark, and the exclusive use of it be entitled to legal protection.” *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S., 537; *Delaware & H. Canal Co. v. Clark*, 13 Wall., 311.

The words “Liver Medicine” are purely descriptive, and could not be appropriated by the complainant to indicate its preparation alone, nor could the word “Simmons,” in connection with the words “Liver Medicine,” be appropriated by the complainants to its preparation alone, that name, under the proof, having become merely descriptive of medicine prepared under the formula of old Dr. Simmons, and used by many people in connection with medicines prepared under that formula. *Marshall v. Pinkham*, 52 Wis., 572.

But the complainants contend that at all events they are entitled to relief against this Cheek package, on the ground of what is styled, in some authorities, unfair competition in business. In relation to the class of subjects we now have under consideration, this may be defined, in general terms, as consisting of any device or trick whereby one manufacturer’s or dealer’s goods are palmed off in the market as and for the goods of another, in fraud of the public and of the person whose goods are so displaced, the most usual of such devices being the simulation of labels, the imitation of another’s style of putting up goods, and the repro-

duction of the form, color, and general appearance of his packages. An attempt to enumerate all such devices would be as futile as an effort to catalogue all the expedients that fraud can employ. It is only within recent years that a distinction has been taken in the authorities between this class of controversies and technical trade-mark cases. In the earlier reported decisions, infringements of trade-marks and simulations of labels and packages are all intermingled under the general designation of trade-marks, or treated as in substance the same thing, if not the same in exact definition. Lately, however, especially in this country, the tendency has been to a narrowing of the use of the term "trade-mark" to its proper signification as an arbitrary symbol affixed by a manufacturer or merchant to a vendible commodity, and to exclude from use as such symbol words merely descriptive or generic, or merely expressive of quality; and also to exclude from designation as such labels, advertisements, signs, and the form, size, and general appearance of packages of merchandise. Browne on Trade-marks, Secs. 29, 39, 43, 79, 81, 83, 87, 89, 89a, b, c, d, 90, 91; 130, 131-134, 137, 544.

The new classification, while useful, seems to lack something of logical accuracy, inasmuch as the imitation of another's trade-mark, if intentional, and done with the purpose of pirating his trade thereby, is as truly an instance of unfair competition in business as any other fraudulent device adopted for that purpose. So that the effect

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is, in the main, only the attainment of a more correct and accurate use of the term "trade-mark," while the cases falling under the new classification are subject to most of the principles that govern technical trade-marks, but not to all. Moreover, the principles that are common to trade-mark law as thus narrowed, and to the subject of unfair competition in business, are also applicable to competition in other kinds of business besides the sale of articles of merchandise, leaving, however, a residuum of peculiar rules applicable only to technical trade-marks.

The correspondences between the two classes of cases are more numerous than their differences. As in cases of trade-mark, so in cases of unfair competition in business, imposition upon the public is a necessary constituent of the plaintiff's title to sue, but only in the fact that it is the test of the invasion of the plaintiff's rights by the defendant. As in one, so in the other, the object and purpose of the law is, first, to secure to him who has been instrumental in bringing into market a superior article of merchandise the fruit of his industry and skill, and, secondly, to protect the community from imposition. As in one, so in the other, the underlying principle is that one man is not to sell his own goods under pretense that they are the goods of another; and as in one, so in the other, the violator of another's rights pirates upon the good will of that other's friends and customers or the patrons of his trade and business, by sailing

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under his flag without his authority or consent. There is this difference, however. The law of trade-marks is designed to protect primarily a property right (Browne on Trade-marks, Secs. 45-47), and, as incidental thereto, gives redress for the injuries resulting from invasions of that right, a distinct, technical trade-mark being in itself evidence, when wrongfully used, of an illegal act, while the jurisdiction exercised over cases of unfair competition in business is grounded in the prevention of fraud. Fraudulent intention is not a necessary ingredient of a pure trade-mark case, as an invasion of another's trade-mark rights may be the result of accident or of a misunderstanding, although it may be and probably is true that in the majority of cases fraud is an element in trade-mark cases in awarding damages and costs (Browne on Trade-marks, Secs. 386, 468), while in a case of unfair competition in business, fraud is of its essence. Browne on Trade-marks, 2d Ed., pages 417-423, Secs. 418-420; *Apollinaris Co. v. Brumler*, decided by the Supreme Court of New York, reported in New York Law Journal, February 4, 1890; Cox's Manual of Trade-mark Cases, 2d Ed., 429, 430; *Carson v. Ury*, 39 Fed. Rep., 777. In the last-named case the true distinction is thus accurately expressed by Thayer, J.: "The Court cannot interfere in this instance, as in ordinary trade-mark cases, on the ground that one person is intentionally or unintentionally appropriating a mark, symbol, design, or word which has become the exclu-

sive property of another when used by him to distinguish goods of a certain class. In short, this is not a trade-mark case. As I view it, it is a bill filed to restrain the defendants from perpetrating a fraud which injures the complainant's business and occasions him a pecuniary loss. Even where no trade-mark was infringed or involved, Courts of Equity have granted injunctions on more than one occasion against the use upon goods of certain marks, labels, wrappers, etc., when the evident design of such use was to deceive the public by concealing the true origin of the goods and making it appear that they were the product of some other manufacturer of established reputation, thereby depriving the latter of a portion of the patronage that would otherwise come to him, or injuring the reputation of his goods."

A short reference to some of these cases may be useful. In *Knott v. Morgan*, 2 Keen, 213 (Cox's Manual, No. 57), it appeared that the omnibuses of the London Conveyance Company were painted, and their servants clothed, in a special and distinctive manner, and that defendant began to run omnibuses similarly painted, with servants similarly clothed. On motion by plaintiff, an injunction was granted to restrain the defendants from imitating the plaintiff's line of omnibuses. Lord Langdale, in delivering his judgment in the case, expressly stated that the plaintiff had no exclusive right to the words "Conveyance Company" or "London Conveyance Company," or any other words, but held

that they had the right to call upon the Court to restrain the defendants from fraudulently using precisely the same words and devices which plaintiff had taken for distinguishing his property, and thereby depriving him of the fair profits of his business by attracting custom on the false representation that carriages, really the defendant's, belonged to or were under the management of the plaintiff.

In *Williams v. Johnson*, 2 Bos., 1, decided by the Supreme Court of New York in 1857, and reported as No. 150 of Cox's Manual, it appeared that plaintiffs were manufacturers of soap which they sold under the name of "Genuine Yankee Soap," using a particular style of wrapper, form of cake, hand-bill, etc., and that the defendant put up his soap in a similar manner with slight variations. It also appeared that there was sufficient doubt about the exclusive right of the plaintiff to use the words "Genuine Yankee" to prevent their being protected. An injunction was granted restraining the defendant from using the simulated wrapper, etc., complained of. Woodruff, J., in his judgment referred particularly to the form and size of cake, particular mode of covering and packing, a combination of three labels on each cake, and an exterior hand-bill upon the box, and the arrangement of the whole, and to the fact that the defendant had copied the form, appearance, color, style, and substantial characteristics which distinguished the plaintiff's goods.

In *Lea v. Hailey*, an English case, decided in 1869, and reported as No. 325 in Cox's Manual, it appeared that the plaintiffs were coal merchants, and carried on business at 22 Pall Mall as "The Guinea Coal Company," and that the defendant, who was their former manager, set up for himself at Beaufort Buildings, Strand, as the "Pall Mall Guinea Coal Company," and afterwards removed to 46 Pall Mall. An injunction was granted to restrain the defendant from trading under that name in Pall Mall. It was said, per Giffard, L. J.: "I quite agree that the plaintiffs have no property in the name (Guinea Coal Company), but the principle upon which the cases on this subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade and carries it on under a given name that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with a person who has given a reputation to the name."

In *Frese v. Bachof*, decided by Judge Wheeler, of the United States Circuit Court for the Southern District of New York, in 1878 (R. Cox's Man., 603), it appeared that plaintiffs were a firm of tea merchants who sold "Hamburg Tea" in a peculiar form of package, the tea being inclosed in long, cylindrical parcels with pink wrappers, and with crimson papers of directions and yellow ones of warning tied in, and having a white label with

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the firm name within a circle pasted across the ends of the string, and another white label with the same, and the words "Hamburg Hopfensack 6" embossed thereon, pasted on the package. The defendant at first put up his tea in a precisely similar manner, but, after the commencement of the suit, discontinued the firm name and inserted his own. An injunction was granted restraining him from using packages similar to those of the plaintiff.

In *Sawyer v. Horn*, decided in 1880, in the United States Circuit Court for the District of Maryland (R. Cox's Man., 667), complainant alleged that to individualize and identify his bluing, he adopted a peculiar and original style of package, "consisting of a blue cylinder having a red top," and that his goods had long been known and identified by consumers by the peculiar appearance of the package. It was also set forth that his method of packing, including the size, shape, and color of his large packages, was original with him, and had never been varied. It was shown that the defendant had knowingly made and sold bluing put up in boxes and packages imitating complainant's article in all these particulars, except that he used his own name and made changes in the wording of his label. Defendant was restrained from putting up his goods in the manner stated, "or in any other manner so simulating the form, color, labels, and appearance given by the complainant to his goods, as to mislead purchasers into taking one for

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the other," and this "whether the plaintiff has a trade-mark or not."

In *Avery v. Meikle*, 81 Ky., 75, decided in 1883, it appeared that the defendant had not imitated plaintiff's trade-mark, yet, that by the exact simulation of plaintiff's plow in every perceivable point, exposed to an ordinary observer and purchaser, and the use of the same coloring and staining, the same relative position of the letters and figures as employed and used by the plaintiff, avoiding the literal appropriation of any part of the trade-mark, they had obscured their own and appellant's trade-mark, but at the same time sought to avoid detection and responsibility in doing so, and to cause their plows to be taken for and purchased as those of plaintiff; that, laying aside their own letters and numerals, which they commonly used to indicate the size, series, and quality of their plows, they took up those of plaintiff; that they quit lettering cast and figuring steel plows, and reversed that order, adopting the order used by plaintiff; that they consulted and deliberated before adopting the letters and numerals or imitating the construction of plaintiff's plows; and that after this deliberation they so imitated the numerals and lettering of appellant's plows that nothing but the reading of their trade-mark, and close inspection, could distinguish the difference; that they made large quantities of plows, leaving off their own trade-mark and name and substituting therefor the names of jobbers who were well known in the market to be

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vendors and not makers of plows, making it in their hands, therefore, impossible, without the aid of expert knowledge, to tell the difference between a Meikle and an Avery plow, as they both had the same *indicia* and were constructed alike, the maker's name being altogether suppressed; and that they employed small salesmen to sell their plows, who placed them on the market one-half dollar cheaper than the Avery plow, and so advertised them as to be taken for those of plaintiff. It was held that plaintiffs were entitled to injunction and relief. And in setting forth the grounds of the judgment the Court say: "The confusion which prevails in the argument against the jurisdiction in this case results from assuming that in all cases the complainant must make out a legal title to an exclusive trade-mark, by means of which, or some part of which, the defendant had done the wrong and injury to his rights. The authorities do not sustain this assumption, but, on the contrary, are numerous and strong that the wrong consists in one person fraudulently selling his goods as and for those of another, either by the use of the other's trade mark or *indicia*, or by any means whatever, if such fraudulent practices result, or are likely to result, in damage to the complainant.

* * * As the object of the Courts of Equity is to prevent one man injuring another's rights by selling his goods as those of the other, why not prevent all fraudulent misrepresentations—whether oral, by sigus, symbols, trade-marks, labels, words,

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or figures—by which that wrong is accomplished? The injury is the same, no matter how or by what means it may be done, and the responsibility should attach when that injury is deliberately and fraudulently committed.”

In *Lelanche Battery Co. v. Western Electric Co.*, 23 Fed. Rep., 275, decided in 1885, it appeared that there was no trade-mark in the case, but say the Court: “The defendants have imitated the label of the complainant to the minutest details, except the signature at the bottom. The complainant is entitled to protection against the unlawful competition in trade thus engendered by the simulation of its label, and upon this ground a decree is ordered in its favor.”

In the case of *Anheiser Busch Brewing Association v. Clarke*, 26 Fed. Rep., 410, decided in 1886, it appeared that “the complainant was the first to use for bottled beer a label with a diagonal red band, with the name of the kind of beer appearing in white letters on the red band, and that he has been habitually using this label for two years.” It appeared to the Court, from an inspection of the labels, that defendant’s labels on bottles of beer would be likely to deceive purchasers desiring complainant’s beer, and an injunction was ordered. There was no question of trade-mark in the case. To same effect see *Anheiser Brewing Co. v. Pisa*, 24 Fed. Rep., 149.

And Browne, in his work on Trade-marks, at Section 43, under the heading of “Unfair Compe-

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tition in Business," writes thus: "In examining cases classified in digests and books of reports as those of trade-marks, the reader is sometimes puzzled. In the absence of the slightest evidence that technical trade-marks have been infringed, Courts of Equity have granted full and complete redress for an improper use of labels, wrappers, bill-heads, signs, or other things that are essentially *publici juris*. The difficulty is that wrong names are used. French speaking nations have a standard name for this kind of wrong. The term used is *concurrency deloyale*. This term may be fairly anglicized as a dishonest, treacherous, perfidious rivalry in trade. In the German Imperial Court of Colmar, in 1873, the Court said that current jurisprudence understands by *concurrency deloyale* all maneuvers that cause prejudice to the name of a property, to the renown of a merchandise, or in lessening the custom due to rivals in business. The euphemism employed as a head to this section will answer the present purpose. It implies a fraudulent intention, while, on the contrary, an enjoined infringement of a technical trade-mark may be the result of accident or misunderstanding, without actual fraud being an element. At law special damage, unless damage is necessarily presumed, deceit, or fraudulent intent must be proved in all cases to warrant a recovery. This is not always so in equity, but it is common both in law and equity where the infringement is perpetrated by other modes and means than the use of any part of a

trade-mark itself; and, whether a trade-mark is shown to have been imitated or not, if the goods of one have been intentionally and fraudulently sold as the goods of another, and the latter has sustained damage, or the former threatens to continue acts tending to that end, a Court of Equity will restrain the further commission of them. This subject belongs properly to the class of good will cases, but, nevertheless, it is necessarily an ingredient in a great majority of trade-mark cases. As an illustration, take *Craft v. Day*, in 1843, which is not a technical trade-mark case. In that, Lord Langdale, M. R., granted an injunction to restrain the defendant from using labels or show-cards calculated to mislead the public, saying that the right which any person may have to the protection of the Court does not depend upon any exclusive right to a particular name of a man or to a particular form of words. His right, said he, is to be protected against fraud, and fraud may be practiced by means of a name, though the person using it have a perfect right to use that name provided he do not accompany the use of it with other circumstances to effect fraud."

In *Croft v. Day*, 7 Beav., 84, above referred to, the following apt language upon this subject also occurs, in addition to that above quoted: "The accusation which has been made against this defendant is this: That he is selling goods under forms and symbols of such a nature and character as will induce the public to believe that he is sell-

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ing the goods which are manufactured at the manufactory which belonged to the testator in this cause. It has been very correctly said that the principle in these cases is this: that no man has the right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colors, or adopt the bare symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose either that he is that other person or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do those things is to commit a fraud, and a very gross fraud."

And in *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S., 537, it is said: "It seems, however, to be contended that plaintiff was entitled at least to an injunction, upon the principle applicable to cases analogous to trade-marks—that is to say, on the ground of fraud on the public and on the plaintiff, perpetrated by defendant by intentionally and fraudulently selling its goods as those of the plaintiff. Undoubtedly, an unfair and fraudulent competition against the business of the plaintiff—conduct with the intent on the part of the defendant to avail itself of the reputation of the plaintiff to palm off its goods as plaintiff's—would in a proper case constitute ground for relief." Then the Court further proceeds: "In *Putnam Nail Co. v. Bennett*, 43

Fed. Rep., 800, where the bill alleged that the defendants had imitated plaintiff's method of bronzing horse-shoe nails which plaintiff used as a trade-mark, with the intention of deceiving the public into buying their goods instead of plaintiff's, and the question came up on demurrer, Mr. Justice Bradley, after stating certain averments of the bill, said orally: 'There is here a substantial fact stated, that the public and customers have been, by the alleged conduct of the defendants, deceived and misled into buying the defendant's nails for the complainant's. That averment is amplified in paragraph four of the bill. Now, a trade-mark, clearly such, is in itself evidence, when wrongfully used by a third party, of an illegal act. It is of itself evidence that the party intended to defraud and to palm off his goods as another's. Whether this is in itself a good trade-mark or not, it is a style of goods adopted by the complainant which the defendants have imitated for the purpose of deceiving, and have deceived, the public thereby, and induced them to buy their goods as the goods of the complainant. This is fraud.'" The Court quotes with approval the case of *Wotherspoon v. Currie*, L. R., 5 H. L., 508, known as the "Glenfield Starch Case," and *Thompson v. Montgomery*, L. R., 41 Ch. Div., 35 and 50, known as the "Stone Ale Case."

"In this important case," says the learned compiler of Cox's Manual of Trade-mark Cases in a note to same, "the Supreme Court of the United States for the first time in its history recognizes

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and explains the fundamental differences between the piracy of a trade-mark and unfair competition in business. In *Goodyear Co. v. Goodyear Rubber Co.*, allusion was made to the existence of a rule whereby 'unfair trade' is restrained, but no attempt was made to define it, or to interpret the adjudications which illustrate its application and purpose. The lucid and accurate opinion of Chief Justice Fuller in the case before us establishes a classification which is obviously logical and obviously useful and of value to the public; and his conclusions are at variance with perhaps not a single well-considered case to be found in the books. The doctrines affecting the protection of technical trade-marks are easily understood; but the subject of what has come to be known as 'unfair competition in business' is much broader and more important. We have here a recognition of the two kinds of cases—(1) those dependent upon the right of property, and (2) those dependent upon fraud, whereby the earlier cases and the thought and learning of the past are harmonized and made to run hand in hand." And, as the learned author further remarks, "Courts of Equity will direct the manner in which words that are *publici juris* shall be used, and will prohibit their use in an inequitable manner for the purpose of misleading the public and displacing an existing business. Beyond this none of the cases go, nor can they be made to go without endangering the doctrine which supports them. Thus, in *Wotherspoon v. Currie* the wrong-doing consisted not

in the use of the word 'Glenfield' in the abstract, but in the use of that word in a particular way. It was printed by the defendant in conspicuous type, whereby his starch was offered and sold as 'Glenfield Starch.' He did not use the word 'Glenfield' to indicate where his article was made, but, in the words of the Court of Appeals of New York, as 'a short phrase between buyer and seller,' or, in the words of the Supreme Court of the United States, the phrase which indicated 'the wish to buy, and the power to sell from that origin.' He used it in that 'secondary sense' which had come to mean the starch of the complainant. * *

It has happened in many instances in which descriptive words have been involved that, by reason of the character of the pleadings or because there was no attempt to apply the doctrine of unfair competition, the plaintiff has failed. But the effect of these cases is to establish only that descriptive words are *publici juris*. They do not decide that the manner in which such words are used will not be regulated according to the maxims of equity. There are decisions perhaps which justify deliberate fraud, but they are based, in almost every instance, upon an illogical view of the common law rights of the defendant, and the assumption that the plaintiff was assailing those rights. But there is no real conflict between the authorities; there has been merely an evolution of thought, whereby we reason with better results and are enabled to understand the old doctrine and more intelligently

to apply it. Perhaps the larger expression is due to looking at the old doctrine under a stronger light and with the aid of the influences of an increasing civilization." These comments of the learned author meet with our approval.

The Supreme Court of the United States, in a very recent case (*Brown Chemical Co. v. Meyer*; 139 U. S., 540), make the following additional observations upon this subject: "The theory of a trademark proper, then, being untenable, this case resolves itself into the question whether the defendants have, by means of simulating the name of plaintiff's preparations, putting up their own medicine in bottles or packages bearing a close resemblance to those of plaintiff, or by the use of misleading labels or colors endeavoring to palm off their goods as those of the plaintiff. The law upon this subject is considered in the recent case of *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S., 537. The law does not visit with its reprobation a fair competition in trade. Its tendency is rather to discourage monopolies except where protected by statute, and to build up new enterprises from which the public is likely to derive a benefit. If one person can, by superior energy, by more extensive advertising, by selling a better or more attractive article, outbid another in popular favor, he has a perfect right to do so, nor is this right impaired by an open declaration of his intention to compete with the other in the market."

As to the quantum and character of evidence in

this kind of case, some useful observations occur in the reports. In *Croft v. Day*, *supra*, it is said: "It is perfectly manifest that two things are required for the accomplishment of a fraud such as is here contemplated. First, there must be such a general resemblance of the forms, words, symbols, and accompaniments as to mislead the public; and, secondly, a sufficient distinctive individuality must be preserved so as to procure for the person himself the benefit of that deception which the general resemblance is calculated to produce. To have a copy of the thing would not do, for though it might mislead the public in one respect, it would lead them back to the place where they were to get the genuine article, an imitation of which is improperly sought to be sold. For the accomplishment of such a fraud it is necessary, in the first instance, to mislead the public, and, in the next place, to secure a benefit to the party practicing the deception by preserving his own individuality."

In *McCann v. Anthony* the Supreme Court of Missouri say: "The governing principle is that one manufacturer shall not be allowed to impose his goods upon the public as the goods of another manufacturer, and so derive a profit from the reputation of that other. It is not necessary that the trade mark, trade name, sign, label, or other device which is employed by one merchant for that purpose shall be an exact imitation or counterfeit of the trade-mark, trade-name, sign, label, or other device employed by the other manufacturer. Nor

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is it required that the imitation be so close as to deceive cautious and prudent persons. It is sufficient if it be so close as to deceive the incautious and unwary, and thereby work substantial injury to the other manufacturer. Nor is it necessary to prove that actual fraud was intended by the manufacturer employing the simulated trade-mark, trade-name, sign, label, or other device, in order to entitle the other manufacturer to relief in equity, or to an action for damages at law. Here, as in most other civil actions, the law does not attempt to penetrate the secret motives or intent with which the act is done, but contents itself with the conclusion that the party intended the natural and probable consequence of the act, and gives its judgment accordingly." Price & Stewart's American Trade-mark Cases, p. 1061.

In *Hostetter v. Adams*, 10 Fed. Rep., 838, the criterion is stated to be: "If the general effect is to deceive an ordinary observer having no cause to use more than ordinary caution." In speaking of the packages in controversy in that case, Judge Blatchford says: "But the general effect to the eye of an ordinary person acquainted with plaintiff's bottle and label, and never having seen the defendant's label, and not expecting to see it, must be, on seeing the defendant's, to be misled into thinking it is what he has known as the plaintiff's."

And, by analogy to trade-mark cases, "it would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who

should see the two marks placed side by side. The rule, so restricted, would be of no practical use. If a purchaser, looking at the article offered to him, would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the Court considers the use of such a mark to be fraudulent. But I go further. I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival as the actual copy of the device." *Seixo v. Provezende*, No. 256 Cox's Manual Trade-mark Cases.

And, continuing the analogy of trade-mark cases, "all that can be done is to ascertain in every case as it occurs, whether there is such a resemblance as to deceive a purchaser using ordinary caution. To constitute an infringement of a trade-mark, exact similitude is not required, but an infringement is committed when ordinary purchasers, buying with ordinary caution, are likely to be misled, it being enough to show that the representations bear such a resemblance to the plaintiff's mark as to be calculated to mislead the public generally who are purchasers of the article bearing it. That means

persons of ordinary intelligence who adopt ordinary precaution against imposition and fraud, and use such reasonable care and observation as the public generally are capable of using and may be expected to exercise. It is sometimes the case that the names of articles are of a character to mislead and deceive, they being *idem sonans* in the usual pronunciation; or the form of the package, general appearance of the wrapper, color of label, wax impressions on the top of the box containing the goods, are well suited to divert the attention of the unsuspecting buyer from any critical examination, and the Courts do not require a critical examination. It was well said by Wood, V. C., in 1854, that in every case the Court must ascertain whether the differences are made *bona fide*, in order to distinguish the one article from the other, whether the resemblances and the differences are such as naturally arise from the necessity of the case, or whether, on the other hand, the differences are merely colorable, and the resemblances are such as are obviously intended to deceive the purchaser of the one article into the belief of its being the manufacture of another person. Resemblance is a circumstance of primary importance for the Court to consider, because if the Court finds, as it almost invariably does find in such cases, that there is no reason for the resemblance except for the purpose of misleading, it will infer that the resemblance is adopted for the purpose of misleading. Such is the reasoning of all the Courts.

Probably Vice-chancellor Shadwell did not go too far, in 1847, when he said that 'if a thing contains twenty-five parts, and but one is taken, an imitation of that one will be sufficient to contribute to a deception, and the law will hold those responsible who have contributed to the fraud.'" Browne on Trade-marks, Sec. 33, and cases cited.

And in the case of *Read v. Richardson*, appearing as No. 698 of Cox's Manual of Trade-mark Cases, the following facts appeared: The plaintiffs and defendants were bottlers of beer for export. Plaintiff's label consisted of a representation of the head of a bull-dog on a black ground, surrounded by a blue circular band, on which were the words, "Read Bros., London: the Bull-dog Bottling." Defendants' label consisted of the representation of the head of a terrier on a black ground, surrounded by a red circular band, on which were the words, "Celebrated Terrier Bottling, E. Richardson," one considerably larger than the other, as appears from the cuts attached to the report of the case. It was made to appear that plaintiff's beer was well known in the colonies as "Dog's Head Beer," and it was alleged that defendants, by exporting their beer to the colonies, where plaintiff's beer was in demand, enabled the substitution of defendants' beer for plaintiffs' beer as "Dog's Head Beer," to plaintiffs' injury. A motion for a preliminary injunction was heard by Jessel, Master of the Rolls, who denied the motion, chiefly on the ground that plaintiffs had failed to

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make out a case of infringement. On appeal, it was held that the use of the defendants' label was an infringement of plaintiffs' rights, especially because it enabled the sale of defendants' beer as "Dog's Head Beer," which name had come to be known as indicating the beer of the plaintiffs. And see *Montgomery v. Thompson*, No. 722, Cox's Manual of Trade-mark Cases.

Concerning the Cheek package under consideration, we find the facts to be that there is now in existence no such firm as T. F. Cheek & Co., the old name of T. F. Cheek & Co. being used by the defendants, Zeilin & Co. and Zeilin & Co., incorporated, in floating said package on the market, the goods being really put up in Philadelphia by Zeilin & Co. as a part of the operations of that business, and sent to Memphis and stored in a wareroom there under charge of one of Zeilin & Co.'s agents, to be thence distributed to the trade. We also find that there is not, and never was, any such firm as A. W. Simmons & Co. represented upon said package, and that A. W. Simmons never authorized defendants to use his name, and that name, together with the representation "warranted purely vegetable by A. W. Simmons & Co., heirs of Dr. A. Q. Simmons," is a misrepresentation, and calculated to deceive the public. We also find the representation on the face of said package as to the improvement of the medicine is also a misrepresentation. And as to whether defendants ever acquired any substantial rights by

the transfer from T. F. Cheek, the proof does not satisfy our minds. We are far from being satisfied by the proof that T. F. Cheek ever acquired any rights from A. Q. Simmons such as he undertook to transfer to White. And certainly the transfer by him and the Eatons of a bare name, unconnected with any existing business, and when that business was bought only to be extinguished, as we think the proof shows, could not confer the right to revive the old name and insignia of that business eight years afterward, to the prejudice of a rival in trade, and for the purpose of foisting upon the public packages of goods that might, by the use of said old insignia, be substituted for the goods of such rival, and lend to the device the semblance of a prior right.

We also find that the trade of the complainant is confined principally to the South-west, and that in that territory its preparation is generally known and called for under the name of "Simmons' Liver Medicine," and that those are the prominent words on the face of its packages, the word "Simmons" being preceded by the letters "M. A.," and the word "Vegetable" being printed in small letters between the word "Simmons" and the word "Liver," so that at the distance of a few feet the title appears to be, "Dr. M. A. Simmons' Liver Medicine;" also, on the front of said package is the picture in black of Dr. M. A. Simmons on a white ground slightly shaded. On the front of the Cheek package is also a picture in black, and under it the

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name of Dr. A. Q. Simmons printed, and just under that, in letters near the same size, the words "Simmons' Liver Medicine." On the back of the Cheek package, near the top, are the words again "Simmons' Liver Medicine," and near the bottom, on the same side, the words "warranted purely vegetable." On the back of complainant's package, in the same position, are the words, "Dr. M. A. Simmons' Vegetable Liver Medicine." In color the packages are not very similar, the color of the Cheek package being pale straw with the printing all in black ink, and complainant's package being white with the printing in black ink, with a bronze border and a bronze shading over the word "vegetable," and the words "C. F. Simmons & Co." being printed in bronze ink, and on the back the word "vegetable," and the words "dyspepsia," "indigestion," and "original" being printed in bronze ink. As to size, it comes nearest complainant's dollar package, the Cheek package being about one-half inch shorter, and being a twenty-five cent package. Placed side by side and compared, the differences between these packages are soon discovered; but, as ruled in the authorities which we have cited, that is not the true criterion. If the general effect is such as to deceive an ordinary observer, having no cause to use more than ordinary caution, being acquainted with plaintiff's package and label, and never having seen the defendants' package and label, and not expecting to see it, must be, on seeing the defendants', to be misled

into thinking it is what he has known as the plaintiff's, that is sufficient. We think, when we take into consideration the large black picture on each package, the most prominent feature on each, together with the words "Simmons' Liver Medicine," which has come to be associated in the minds of the people with complainant's preparation, and the arrangement and collocation of words before referred to, that an ordinary person calling for complainant's preparation and exercising only ordinary caution, and having the Cheek package handed to him, would mistake one for the other. And the proof shows that since this package has been upon the market it has in numerous instances been received by customers calling for complainant's medicine, without question or objection. The proof also shows that this package was put upon the market only in this section of the country, where complainant's trade existed. We also think that this package was put upon the market by the defendant for the purpose of having it take the place of complainant's medicine, and to be sold as and for that medicine. We think the charge of unfair competition in business has been clearly made out against the defendants with regard to this Cheek package.

The complainant is entitled to an injunction restraining J. H. Zeilin & Co. and J. H. Zeilin & Co., incorporated, from putting on the market their medicine put up in packages with the Cheek labels on them, and from disposing of the packages so

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labeled that are now in existence, and from issuing packages of their medicine with the imprint upon their label or packages of the words "Simmons' Liver Medicine" or "Dr. Simmons' Liver Medicine" or "Liver Medicine by A. Q. Simmons," in conjunction with the picture of A. Q. Simmons, or in such other combinations as will cause them to be mistaken for complainant's packages by one exercising ordinary care; and that complainant is entitled to an injunction to restrain the defendants from using the Cheek package or label or wrapper in any manner or form; and the complainant is entitled to have the cuts, dies, labels, and wrappers pertaining to said Cheek package delivered up to be destroyed.

Defendants insist that the Chancellor erred in ordering an account to ascertain the damages of complainant in respect of the Cheek medicine made and sold by defendants. It is customary in this class of cases to order such an account. *Gato v. Elmodelo Cigar Mfg. Co.*, 6 Lawyers' Reports Annotated, 824; *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep., 217; *Atlantic Milling Co. v. Rowland et al.*, 27 Fed. Rep., 24. But it is said that the complainants have been guilty of such laches as would deny them the right to an account. This is a good defense to an accounting where there has been real neglect. Browne on Trade-marks, Sec. 497; *McLean v. Fleming*, 96 U. S., 245; *Holt v. Menendez*, Price & Steuart's American Trade-mark Cases, 986 and 989. But we do not think there

has been any such delay in this case as to deny complainant the right to an accounting. The Cheek package was put on the market in January, 1890, and the bill in this case was filed in January, 1891. A party is not compelled to file his bill at once, but may lie by until sufficient time shall elapse to enable him to gather the requisite proof; besides, it appears from a letter in the record, written by Mr. I. L. Corse, defendants' agent, in January, 1890, that defendants had full information that their putting the Cheek package on the market had been promptly complained of by the complainant, and was bitterly objected to by complainant. Defendants also insist that complainant should be denied the account, because T. F. Cheek at Birmingham and T. F. Cheek & Co. at Memphis were making and selling the medicine from 1871 to 1882, and complainant's predecessor did not object. Without going into the question as to whether the conduct of T. F. Cheek and of the old firm of T. F. Cheek & Co. ten to twenty years ago amounted to a violation of the rights of complainant's predecessor, it is sufficient to say that, even if it were, it could not justify the defendants' conduct at this time.

We do not consider the questions raised by defendants' cross-bill. We think the defendants' conduct with regard to the Cheek package is such as to disentitle them to any relief in a Court of Equity. The cross-bill will therefore be dismissed.

A decree will be entered in accordance with this

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opinion, and the cause remanded for the execution of the order of reference, and for the delivery and cancellation of said cuts, dies, labels, and wrappers. The costs below will be paid as adjudged by the Chancellor. The costs of this Court will be paid by defendants, and subsequently accruing costs as the Chancellor may direct.

Burns v. Allen.

BURNS v. ALLEN.

(Jackson. July 28, 1893.)

1. PAROL EVIDENCE. *Of testator's declarations, inadmissible, when.*

Parol evidence is inadmissible under § 3033 (M. & V.) Code (providing that a child born after the making of a will, "not provided for nor disinherited, but only pretermitted in such will," nor provided for by settlement, shall succeed to the same portion of the testator's estate as if he had died intestate), of declarations by the testator before and after making his will, showing that an omission to provide therein for a posthumous child was intended as a disinheritance.

Code construed: § 3033 (M. & V.); § 2193 (T. & S.).

2. DEED. *Construction of.*

A deed reciting that it is given to a divorced wife "in settlement of all demands for homestead, alimony, counsel fees, and support of child," is not such a settlement on a posthumous child as will prevent it from inheriting under § 3033 (M. & V.) Code, providing that a child, if unprovided for by will and not disinherited therein or provided for by settlement, shall inherit as if the testator had died intestate, especially if the decree of divorce has settled the same property on the wife with a provision that it shall not be construed as in any way "to militate against the yet unborn child" of complainant.

Code construed: § 3033 (M. & V.); § 2193 (T. & S.).

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
W. D. BEARD, Ch.

JOHN R. FLIPPIN and G. P. M. TURNER for
Burns.

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B. J. KIMBROUGH, J. P. SYKES, and JAMES M. GREER for Allen.

McALISTER, J. This bill was filed in the Chancery Court of Shelby County by the guardian of Mattie Eddins, only child of John T. Eddins, deceased, against the defendants, who are sisters of said Eddins, to recover certain real estate devised to the latter under the will of said John T. Eddins. The said Mattie is the posthumous child of John T. Eddins, and was born in March, 1891, her father, the said John T., having died in December, 1890. It appears from the record that on October 17, 1890, the mother of Mattie Eddins procured a divorce from the said John T. Eddins in the Circuit Court of Shelby County, and in the decree certain real estate was settled upon the divorced wife. It further appears that on December 4, 1890, the said John T. Eddins made and published his last will and testament, in which he devised all of his remaining property to his two sisters. As already stated, the said Eddins died December 17, 1890, and the said Mattie was born in March following.

The bill is filed by the guardian of the child under § 3033, Code (M. & V.), which provides as follows: "A child born after the making of a will, either before or after the death of the testator, not provided for nor disinherited, but only pretermitted, in such will, and not provided for by settlement made by the testator in his life-time,

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shall succeed to the same portion of the testator's estate as if he had died intestate." This section of the Code was taken from the Acts of 1823, Chapter 28, viz.: "Where any person shall hereafter by last will and testament dispose of his property, and the same shall contain no provision for any child or children born after the making thereof, whether before or after the death of the father, and such child or children be neither provided for nor disinherited, but only pretermitted, in said will, nor any provision made for them by settlement, such child or children shall succeed to the same portion of the father's estate as he, she, or they would have been entitled to if the father had died intestate," etc.

It is claimed by counsel for defendants that this section is only intended to make provision for a child where the parent has by oversight or forgetfulness failed to mention it in his will, and that this meaning is obvious from the language employed in the statute, to wit: "But only pretermitted in said will, and not provided for by settlement made by the testator in his life-time." The defendants, upon this theory, offered, at the hearing below, to prove the declarations of the testator alleged to have been made both before and after the execution of the will, to show that the omission to provide for the child in the will was not the result of forgetfulness, but that it was intended as a disinheritance of the child. This evidence was excluded by the Chancellor, and defend-

ants assign this ruling as error. The contention of counsel for the minor child is that the act of disinheritance must affirmatively appear in the face of the will, and that parol evidence of the declarations of the testator is wholly inadmissible. This contention is based primarily upon the phraseology of the statute itself, to wit: "A child born after the making of a will, either before or after the death of the testator, not provided for nor disinherited, but only pretermitted, in such will," etc. The insistence is that this section must be interpreted as if it read "neither provided for nor disinherited in such will, but only pretermitted," etc.

Ordinarily, the failure of a testator to make provision for a child in his will would be equivalent to a disinheritance of that child, the testator possessing the absolute power to make any disposition of his property by last will and testament, no matter how capricious or apparently unnatural. But, under the express provisions of this statute, we are of opinion that a posthumous child of the testator will succeed to the same portion of his estate as in case of intestacy, unless, first, the testator had in his life-time provided for the child by settlement; or, second, the testator has made provision for the child in his will; or, third, unless there is an affirmative act of disinheritance of the child in the will itself. We think there was no error in the action of the Chancellor in excluding the evidence offered to show a parol disinheritance

of the infant complainant, and that his construction of the statute was correct.

The child being neither provided for nor disinherited by the will, it remains to be seen whether she was provided for by settlement made by the testator in his life-time. It is claimed this was done by a deed made to the testator's wife on October 18, 1890, which recites that, "whereas, a divorce has been granted by the Circuit Court of Shelby County, this is in settlement of all demands for homestead, alimony, counsel fees, and support of child," etc. The deed then vests the title of the property conveyed in his divorced wife, and clothes her with all the powers of a *feme sole*, to dispose of the same by will, deed, or mortgage, free from the debts and control of any future husband. The divorce bill had prayed that the title to the property might be vested in the wife for life, with remainder to the child, but in this deed from the husband the wife is vested with the absolute estate, and the child takes no remainder interest or estate of inheritance. It is manifest this is not such a settlement in favor of the child as is contemplated in § 3034 of the Code.

Again, if Eddins intended this as a settlement on the child, he had no power to make it in respect to this piece of property, for the reason that the same piece of property had, on October 17—a date prior to the date of the deed—by final decree of the Circuit Court, been settled upon the wife, with the distinct reservation "that it should

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not be construed, accepted, or taken in any way to militate against the rights of the yet unborn child of complainant."

The said Mattie Eddins not having been provided for in the life-time of the testator, nor provided for in his will, nor disinherited in his will, the decree of the Chancellor giving her the real estate in question must be affirmed.

Cole v. Warner.

COLE v. WARNER.

(Jackson. July 28, 1893.)

BAIL-BOND. *Creates no lien upon obligor's lands.*

The execution of a bail-bond does not create a lien on the lands of the obligor.

Cases cited and distinguished: State v. Miller, 11 Lea, 620; State v. Winn, 3 Sneed, 393; Pugh v. State, 2 Head, 228.

FROM CARROLL.

Appeal from Chancery Court of Carroll County.
A. G. HAWKINS, Ch.

H. C. TOWNS, CARUTHERS & MALLORY for Cole.

JO. R. & H. N. HAWKINS for Warner.

McALISTER, J. The only question presented for decision in this case is whether the execution of a bail-bond creates a lien on the land of the obligors. The question arises in a contest between the mortgagee of the land and a purchaser of the land at a judicial sale had in pursuance of a judgment upon the forfeited bail-bond.

The facts presenting the question are these, to wit: W. E. Warner was the owner of a lot of ground in the town of Trezevant, in Carroll County. On April 13, 1886, the Sheriff of Carroll County arrested one Luke Warner, upon a *capias* issued from the Circuit Court of said county, for the offense of malicious shooting, and upon said day the Sheriff accepted from the prisoner, the said Luke Warner, a bail-bond in the sum of five hundred dollars, with W. E. Warner, the owner of this land, as surety, conditioned for the appearance of said Luke Warner at the next term of the Circuit Court of said county to answer for said offense. The bond was duly returned by the Sheriff to the next succeeding term of said Court, and on May 5, 1886, during said first term, a forfeiture for non-appearance was taken against the said Luke Warner and his surety, the said W. E. Warner, on said bond, for the sum of five hundred dollars.

At the September term of said Court, in 1888, said judgment *nisi* was made final. On June 22, 1889, an execution issued on said judgment, which came to the hands of the Sheriff, who, on the — day of —, 1889, levied the same on this land. The land was sold on June 5, 1890, for the satisfaction of said judgment, and the same was struck off to P. A. Hollingnest, who afterwards directed that the deed be made to the complainant, W. H. Galloway, which was accordingly done. It was in this way that Galloway acquired his title to this

land, which he now claims is superior to that of Cook & Bernheim. The latter firm acquired their title in the manner following: It appears from the record that after the execution of the bail-bond by Luke and W. E. Warner, which it will be remembered was on April 13, 1886, the said W. E. Warner and wife, on April 29, 1886, executed to J. T. Cole a mortgage on said land to secure an indebtedness of \$250 due to Cole. At a subsequent date Cole transferred said indebtedness to Cook & Bernheim, merchants of New York. It further appears that on May 28, 1891, Cole and Cook & Bernheim filed their bill to foreclose the mortgage in the Chancery Court at Huntingdon against Warner and wife.

At the February term of said Court, 1892, the said Galloway presented a petition in said cause, in which he set forth his title to said land by virtue of the Sheriff's deed made to him under the forfeiture proceedings in the Circuit Court of Carroll County against Luke Warner and his surety, the said W. E. Warner. The Chancellor ordered that said petition be filed in the nature of an original bill, and that the same be consolidated with the case of *J. T. Cole et als. v. W. E. Warner et als.*

On the hearing the Chancellor decreed that the State, by virtue of the execution to it of the bail-bond, acquired a lien upon said land, and that W. H. Galloway, by virtue of the Circuit Court proceedings, sale, and Sheriff's deed, acquired a

superior right to said land, and was entitled to the possession of it. Cook & Bernheim appealed, and have assigned errors.

The validity of the judgment pronounced by the Circuit Court on the forfeited bail-bond is challenged upon several grounds, to wit: First, because judgment final was taken against all the parties to said bond without dismissing as to Luke Warner, or causing two writs of *sci. fa.* to be returned as to him "not found." Complainant cites § 6009 Code (M. & V.), viz.: "When two *sci. fas.* have been returned not found by the proper officer of the county in which the undertaking was entered into, such returns are equivalent to a personal service, and judgment may be made absolute." 3 Cold., 91; 6 Lea, 199.

It is next objected that the lien of the judgment, if valid, was lost by the failure to take out execution and sell the lot within twelve months from its rendition. Code, § 3694.

It is unnecessary to notice the infirmities pointed out in the Circuit Court proceedings, since it was stated in argument by counsel for complainant, Galloway, that he did not rest his case upon the lien acquired by the judgment, levy, and sale of the property, but upon the lien in favor of the State that attaches to the execution of a bail-bond. No statute of this State, nor any adjudication of this Court sustaining the claim to such a lien, has been cited by counsel in argument, nor have we been able to find such authority for it. It is well

settled that a recognizance entered into in a Court of record creates a direct and specific lien upon the lands owned by the cognizors at the time of its acknowledgment, and situated in the county where the recognizance is taken. *State v. Miller*, 11 Lea, 620; *State v. Winn*, 3 Sneed, 393; *Pugh v. State*, 2 Head, 228.

There is no room, however, for the application of the rule governing the recognizance to the case of the ordinary bail-bond, for there is a marked difference between the two kinds of undertaking. The principal difference between the two forms of obligation lies in the fact that a recognizance is a matter of record in the nature of a conditional judgment, and is proceeded upon by *scire facias*, while a bond is but an evidence of debt, for the recovery of which an action must be brought. A bail-bond is taken out of Court in vacation, and a recognizance is taken in open Court, in which the cognizors confess judgment, to be levied on their property in case the principal makes default in his appearance.

The policy of our registration laws negatives the idea that a lien could arise by the mere execution of a bail-bond. Instruments conveying land, or fixing liens on land, must be recorded in the county where the land lies, unless it lies partly in two or more counties, and then it must be registered in one or the other. If the instrument embraces several tracts lying in different counties, it must be recorded in each county. Code (M. & V.), § 2843.

Judgments and decrees of Courts of record rendered in the county of the debtor's residence constitute a lien upon the debtor's land from date of rendition, the lien to be enforced within twelve months thereafter. Code (M. & V.), § 3694. If rendered in any other county than that of the debtor's residence, a copy of the judgment must be recorded in the county where the debtor resides, in order for the lien of the judgment to attach. Code (M. & V.), § 3695. "All these provisions," says Judge Freeman, in *State v. Miller*, 11 Lea, 620, "indicate the policy of our State to be that liens and charges on lands shall be evidenced by a record at the locality where they would most naturally be expected to be found," etc.

It would be an anomaly in the law if a Sheriff or Constable could take a bail-bond and carry it around in his pocket for months, with no knowledge or means of knowledge on the part of the public of its existence, and thus create an ambulatory lien which would override all subsequent conveyances. We hold that no such lien exists. It follows that complainant is entitled to a foreclosure of the mortgage on the lot in controversy, and that the decree of the Chancellor must be reversed.

Allen v. Maronne.

ALLEN v. MARONNE.

(Jackson. July 28, 1893.)

1. MEASURE OF DAMAGES. *For illegal discharge of employe.*

For his illegal discharge before expiration of his stipulated term of service, an employe is entitled to recover of his employer full wages or salary for the entire term, less payments and such further sum as he did earn or might, by due diligence, have earned during the remainder of the term.

2. SAME. *Same. Acceptance of new employment not an abandonment of his claim.*

Acceptance of new employment by the illegally discharged employe, during the unexpired term of his service, is not a waiver or abandonment of his claim for damages against his first employer. It is the employe's legal duty to use due diligence to obtain new employment.

3. SAME. *Same. Discharge of employe from the new employment.*

The lawful discharge from the new employment of an employe illegally discharged from a former employment cannot affect the right or amount of his recovery against his first employer, where, immediately after his lawful discharge, he obtains other employment for better wages and a longer time.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County. L. H. ESTES, J.

M. B. TREZEVANT for Allen.

W. A. PERCY for Maronne.

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McALISTER, J. This is a suit by an employe against his employer, to recover balance due on salary. There was a verdict and judgment in the Court below in favor of the plaintiff for eleven hundred and sixty-two (\$1,162) dollars. The defendant appealed, and has assigned errors.

It appears from the record that, on November 10, 1890, William Maronne was employed by the firm of Thomas H. Allen & Co. as cotton salesman, for one year, at a stipulated salary of eighteen hundred dollars. Maronne entered upon the discharge of his duties, and gave entire satisfaction to his employers; but, on November 25, 1890, the firm of Thomas H. Allen & Co., failing in business, made an assignment, and Maronne was discharged. At the date of his discharge, the firm was indebted to Maronne, on account of salary, in the sum of one hundred dollars, which they paid in full. In a few days thereafter, Harry Allen, one of the late firm, began a cotton factorage business on his own account, and immediately employed Maronne to perform the same services, and at the same salary he was to have received from Thomas H. Allen & Co. No definite time of employment was fixed. In his new employment, Maronne earned one hundred and eighty dollars, and was discharged, January 1, 1891, for an alleged cause. Maronne then made an effort to find employment in Memphis, but, meeting with no success, January 5, 1891, he went to New Orleans, where he secured a position with Strauss & Co.

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as cotton salesman. Maronne remained in the employment of Strauss & Co. until August 1, 1891—the termination of the cotton season—and earned, during his connection with that firm, the sum of four hundred and thirty dollars. It appears from the record that Maronne was diligent in seeking further employment, but without success.

The Circuit Judge properly charged the jury that plaintiff would be entitled to recover balance due on his salary for one year, less any amount earned, or that ought, by reasonable diligence, to have been earned in any other employment.

The verdict of the jury was for the balance due on the salary at the contract price of eighteen hundred dollars, after crediting it, first, by the sum of one hundred dollars paid by Thomas H. Allen & Co.; second, by the sum of one hundred and eighty dollars paid by Harry Allen; and, third, by the sum of four hundred and thirty dollars earned by Maronne while in the employment of Strauss & Co., with interest on balance found to be due.

It is insisted, on behalf of Thomas H. Allen & Co., that Maronne abandoned his first contract; that is to say, he acquiesced in his dismissal by accepting a new and distinct employment with Harry Allen for the same time and at the same salary as under the first contract. We think this position is untenable. It is well settled that the proof of such release, renunciation, or acquiescence, when arising from acts or language, must be clear

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and unequivocal. We find no such proof in the record, and it is not true, as a matter of law, that a man who has been illegally discharged, by accepting a second employment thereby acquiesces in his discharge, or waives his right of action for the breach of the first contract. If Maronne had not accepted the new contract of employment, he would have been precluded, in this action, from a recovery for a breach of the original contract to the extent of what he might have earned in his new employment. It was his imperative duty to accept the second employment. *Jones v. Jones*, 2 Swan, 608. The plaintiff's right of action accrued when the original contract was broken without fault on his part. His subsequent conduct does not affect his right of action, but only affects the amount of recovery according as Maronne may have secured other employment, or may have been idle or diligent in seeking employment. *Sedgwick on Damages*, Sec. 667.

It is also insisted on behalf of plaintiff in error, that Maronne was discharged by Harry Allen from the second employment for a sufficient cause, and that Thomas H. Allen & Co. are entitled to be credited with what Maronne might have earned to the end of the year. It is not shown, however, that the second employment was for any definite time, and, in point of fact, Harry Allen ceased to do business on his own account March 1, 1891. It thereby appears that if Maronne had not left Harry Allen on January 1, 1891, his employment

would only have continued, in any event, until March 1, 1891.

There was much proof taken and controversy below upon the question whether Maronne had been dismissed by Harry Allen for sufficient cause, it being insisted by defendant that Maronne, having been discharged on account of his misconduct, he should be charged with the full amount of what he might have earned if he had remained in the employment of Harry Allen. We think this issue immaterial, since the fact is undisputed in the record that Maronne, immediately upon severing his connection with Harry Allen, secured employment with Strauss & Co., of New Orleans, where he earned more money than he could have earned under his contract with Harry Allen, and Thomas H. Allen & Co. are given full credit for these earnings. It is immaterial, in this view of the case, whether Maronne was rightfully discharged by Allen or not.

We have carefully examined all the assignments of error, and do not find any of them well taken. The charge of the Circuit Judge was quite as favorable to the defendants as they were entitled to under all the facts and circumstances of the case.

The judgment is affirmed.

BLASS v. HELMS.

(Jackson. July 28, 1893.)

WILL. *Class doctrine illustrated.*

A testator devised certain lands to his widow for life, and "at her death" to his son, and then provided that if the son should "die without any child or children living at the death of my wife, or if he should die after the death of my wife, without leaving any child or children, I devise the same to the living children of my daughter, Mrs. B., and the child or children of any of her children that may be dead." Both widow and son survived testator. The widow survived the son, who left no children. Testator's daughter, Mrs. B., had two children at the date of the widow's death, one of whom subsequently died without issue. She had likewise two other children born after the widow's death.

Held: 1. The children of Mrs. B. living at the date of the widow's death took the lands as a class, to the exclusion of the after-born children. 2. The survivor of the class took the entire fee upon the death of the other, to the exclusion of the after-born children.

Case cited and approved: *Satterfield v. Mays*, 11 Hum., 58.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County. W. D. BEARD, Ch.

B. W. HIRSCH, RANDOLPH & SONS, and JOHN P. EDMONDSON for Blass.

FRAYSER & HEATH and H. F. WALSH for Helms.

McALISTER, J. The only question arising in this case is in respect to the proper construction of the second item of the will of William English, which is as follows:

"Item Second.—I give, devise, and bequeath to my wife, Joanna English, for and during her natural life, my lot and the two brick houses thereon, situated on the north-west corner of Shelby and Beale Streets, fronting on Shelby Street forty-seven (47.3) feet and three inches, and running back on Beale Street eighty feet; and, at her death, I give and devise the said lot and houses above described to Michael English, the son of myself and present wife, Joanna; * * * and if my son, Michael English, die without any child or children living at the death of my wife, or, if he should die after the death of my wife, without leaving any child or children, I devise the above-described lot and houses to the living children of my daughter, Mrs. Margaret Briscoe, and the child or children of any of her children that may be dead," etc. .

It appears from the record that the testator, William English, died in 1866, and that his widow, the said Joanna mentioned in the will, died in 1870. Michael English, the son of the testator, died in 1867, unmarried and without issue. Margaret Briscoe, the daughter of the testator referred to in the will, had three children by her first husband, to wit, Anderson, Paul F., and Mary Briscoe. Anderson Briscoe was born before the death of the testator, and is still alive. Mary F.

Briscoe was born February 1, 1869, and died in October, 1875; Paul F. Briscoe was born after the death of Joanna English, and is still alive.

The husband of Margaret Briscoe having died, she intermarried with one Helms, and by him had a son, Maurice E. Helms, who was born July 11, 1881, and is still surviving. The question presented for adjudication, therefore, is whether, under the will of William English, Paul F. Briscoe and Maurice E. Helms, children of Margaret Briscoe, who were born after the death of Joanna English, the life tenant, take any interest in the property.

The Chancellor held that, "under the second clause of the will, Joanna English took the property therein described for life, with a vested remainder in Michael English, determinable upon his dying during said life tenancy without children or survivor or survivors of any dead child living at the date of the death of the life tenant, or upon his death, after the death of said life tenant, without any child or children him surviving, with an executory devise over, upon the happening of either contingency, to the then living children of Margaret Briscoe, who, under the terms of said clause, were to take as a class."

The result of the decree of the Chancellor is that Anderson Briscoe and Mary F. Briscoe, children of Margaret Briscoe, who were born before the death of Joanna English, the life tenant, were entitled to the whole property, and that the after-born children of Margaret Briscoe took no interest.

He further held that Anderson Briscoe, having survived his sister, Mary F. Briscoe, as her heir, took the whole fee.

It is assigned as error that the Court erred in its construction of the will of William English, and that Anderson Briscoe and Mary Briscoe are not the only persons interested in the devise; that the devise was to a class; that it was flexible, and let in after-born children. It is claimed that the word "living" used in this item of the will, is used in contradistinction to the word "dead" in the same phrase. The contention is that the phrase simply means that living children and the children of dead children are placed on the same footing, and that there is nothing in the will to indicate that the word "living" means living at the death of Joanna English, the life tenant. We think the decree of the Chancellor is correct. The law is well settled that where a particular estate is carved out and the remainder is devised to a class of persons, and a future period of distribution is fixed, such persons only will take who come within the class at the time of distribution, and children born after that period are excluded.

It is perfectly apparent from a consideration of this will that the devise was to the children of Margaret Briscoe as a class, and the death of Joanna English, the life tenant, was fixed upon as the period for distribution.

The second clause provides that if Michael English dies without issue before the death of Joanna,

then this property, on the death of Joanna, is to go to the living children of Margaret Briscoe—that is to say, to those children that may be living at the death of Joanna English.

As already stated, Michael English died in 1867, unmarried and without issue, while his mother, the said Joanna English, lived until 1870.

In *Satterfield v. Mays*, 11 Hum., 58, this Court said, viz.: “Where a bequest is made to a class of persons subject to fluctuation by increase or diminution of its numbers in consequence of future births or deaths, and the time of payment or distribution is fixed at a subsequent period, or on the happening of a future event, the entire interest vests in such persons only as at that time fall within the description of persons constituting such class.”

In 2 Jarman on Wills, page 76, 2d Am. Ed., and also on page 704, Vol. 2, 5th Am. Ed., the rule is stated as follows: “Where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution. Thus, in the case of a devise or bequest to A for life, and after his decease to the children of B, those living at the death of the testator, together with those who happen to be born during the life of A, the tenant for life, are entitled, but not those who come into existence after the death of A.”

It was manifestly the intention of the testator, under the second clause of this will, to fix the death of his wife, and the termination of her life estate, as the period of distribution. This construction is obvious for several reasons, to wit: First, a life estate is carved out for the said Joanna English. The will then provides that at her *death*, "I give and devise the said lot to Michael English," clearly indicating that Michael English was not to take absolutely until after his mother's death.

The estate of Michael English was a vested remainder, but this remainder was determinable upon two contingencies, to wit: First, the death of the said Michael without issue *before* the death of Joanna, and, second, the death of Michael without issue *after* the death of Joanna.

It is manifest that it was clearly the intention of the testator to fix the death of his wife as the time for distribution.

The will next provides, viz.: "I devise the above described lots to the living children of my daughter, Margaret Briscoe, and the child or children of any of her children that may be dead." The term "living" children restricts the devise to such children as may be living at the death of said Joanna English, and such children who answer the general description when the distribution is to be made, are entitled to take in exclusion of those coming *in esse* after the death of the said Joanna.

The only children of Margaret Briscoe living at the death of Joanna, were Anderson Briscoe and

Mary F. Briscoe, who took the property absolutely to the exclusion of Paul F. Briscoe and Maurice E. Helms, who were born long after the death of the said Joanna. Mary F. Briscoe having died in infancy, her brother, the said Anderson Briscoe, as her heir at law, became vested with the title to the whole property.

The decree of the Chancellor is affirmed.

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RAILROAD v. SPENCE.

93	173
116	345

(Jackson. June 30, 1893.)

1. MASTER AND SERVANT. *Conductor is not fellow-servant of fireman.*

A conductor in charge of a freight-train, with authority to direct and control its movements, bears the relation of vice-principal, not of fellow-servant, to a fireman thereon. (*Post*, pp. 177-187.)

Cases cited and approved: *Railroad v. Wheless*, 10 Lea, 746; *Railroad v. Lahr*, 86 Tenn., 340; *Railroad v. Collins*, 85 Tenn., 227; *Railroad v. Bowler*, 9 Heis., 866; *Railroad v. Handman*, 13 Lea, 423; *Mining Co. v. Davis*, 90 Tenn., 718; *Railroad v. DeArmond*, 86 Tenn., 78; *Railroad v. Kenley*, 92 Tenn., 207; 112 U. S., 390; 3 Ohio St., 210; 13 Sup. Ct. Rep., 914.

2. SAME. *Railway company's liability for injury caused by conjoint negligence of conductor and engineer.*

A railway company is liable for an injury to a fireman resulting from the negligence of the engineer in the operation of its train, if the negligence of the conductor, having charge of the train as a vice-principal, contributed thereto materially and proximately. (*Post*, pp. 177-187.)

3. CHARGE OF COURT. *Innocuous error.*

An objectionable statement in a charge of the court, if fully explained in immediate connection therewith, so that it could not have misled the jury, is not reversible error. (*Post*, p. 187.)

4. EVIDENCE. *Erroneous exclusion cured by subsequent admission.*

Sustaining an objection to a question is not reversible error if the answer is subsequently obtained by other questions. (*Post*, pp. 187, 188.)

5. DAMAGES. *Method of calculation.*

Amount of damages for the wrongful taking of life must be left to the sound discretion of the jury, upon consideration of the several elements involved, and cannot be made the subject of mere mathemat-

Railroad v. Spence.

ical calculation, upon the basis of what the deceased would have earned during his expectancy of life. (*Post*, pp. 188-190.)

Case cited: Railroad v. Stacker, 86 Tenn., 343.

FROM MADISON.

Appeal in error from Circuit Court of Madison County. LEVI S. WOODS, J.

McCORRY & BOND and M. B. GILMORE for Railroad.

HAYNES & HAYS for Spence.

McALISTER, J. The plaintiff below, Mrs. Ella Spence, brought this suit to recover damages for the killing of her husband, which she alleges was occasioned by the negligence of the railroad company. The plaintiff's intestate, W. G. Spence, at the time of the accident, was a fireman on a freight-train going north from Jackson, which collided with a south-bound passenger-train a few miles above Oakfield, and in the collision Spence sustained personal injuries from which he died in about one hour. The passenger-train was coming south, and was designated on the time-table as No. 3. The freight-train was going north, and was designated as No. 22. The passenger-train was on time, and,

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according to the schedule, was due at Medina, a station seven miles north of Oakfield, at 2:02, and at Oakfield, a station eight miles north of Jackson, at 2:18, and at Jackson at 2:35. The freight-train received orders at Jackson at 1:38, the engineer and conductor both receipting the train-dispatcher. These orders referred to other trains. They were told that the passenger-train was on time. The engineer and conductor both had time-cards showing the time of the passenger-train, and when due at stations. The time-card required that this freight-train should reach Oakfield and take the siding five minutes in advance of the arrival of the passenger-train. The freight-train was, however, not stopped at Oakfield. As it approached this station, the engineer sounded the whistle, the brakes were applied, and one of the witnesses, a brakeman on this train named Poe, testified that the engineer gave him a signal to let the brakes off, which was done, and the train, passing Oakfield, went forward to the place of the accident. It appears that the crew in charge of the passenger-train were in no default, but the collision was brought about by the negligence of those in charge of the freight in wrongfully passing Oakfield.

The gravamen of the plaintiff's action is that her intestate husband was in the employment of the defendant company in the capacity of fireman on the locomotive-engine of the freight-train; that said train was in charge of one Barnett as conductor, who was superior in rank and grade, and

whose orders the plaintiff's intestate was bound to obey; that said conductor represented the company in the management of said train, and was in command of the crew, with authority to order and direct their movements. Plaintiff claims it was the duty of the conductor and engineer, under the rules of the company, to have taken the siding at Oakfield, and to have held said freight-train there until the arrival and passage of No. 3, which they knew was approaching from Medina, and that by passing Oakfield a collision was inevitable, as there was no intermediate station or side-track.

Plaintiff claims that she is entitled to a recovery whether the collision occurred by reason of the negligence of the conductor, or by the combined negligence of the engineer and conductor, as the latter represented the company, and plaintiff's intestate assumed no risk of any negligence on the part of the company or its immediate representative. It is further insisted that plaintiff's intestate was not guilty of contributory negligence in not observing the approach of the passenger-train, since his duty was that of obedience, and he had a right to presume that the engineer and conductor had orders from the train-dispatcher to pass Oakfield and meet the passenger-train at some other station.

There was a verdict and judgment in favor of the plaintiff for \$12,000. The railroad company appealed, and has assigned errors.

The first assignment of error is based upon the

following instructions of the Court given in charge to the jury, viz.:

“Where the direct or immediate cause of the accident is caused alone by the fault or negligence of the conductor in charge of the train, or where the fault or negligence of the conductor and engineer equally bring about a collision and caused the death of the fireman, he not being in fault, etc., a recovery can be had.”

And again: “If it was the duty of Spence, the fireman, to put coal in the engine and also to look ahead for any obstructions on the track, and to look out for signals by the conductor, through the brakemen, and he did not have the control or management of the train, and no right to say whether it should stop or not, then he would stand in the relation of a subordinate to the conductor.”

And again: “And if the proof shows that he was fireman, * * * and the conductor and engineer were both furnished with the rules and regulations of the company and a time-card, and * * * you find that the company held the conductor and engineer equally bound for the safety of the train and the observance of the rule not to run on the time of the passenger-train, and further find that the engineer carried the train on by and failed to stop at Oakfield, and that the conductor failed or neglected to signal the engineer or try to stop the train, and you further find that the train went on and made no stop and had the collision, and plaintiff's husband was killed in the performance of his

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duty as fireman, without fault or negligence on his part, then plaintiff could recover."

Again: "If the rule or regulation of the company was equally binding on the engineer and conductor to stop and side-track, and they failed to do it, and the conductor took no steps to have the engineer stop at Oakfield, and you find that the failure to stop at Oakfield was the immediate and direct or proximate cause of the injury, and brought about by the fault or negligence of the conductor, then plaintiff could recover."

The specific exceptions to the instructions of the Court recited above, are that Barnett, the conductor, Hillsman, the engineer, and Spence, the deceased fireman, were fellow-servants, engaged in the common employment of operating the train and getting it over the track, and that the company is not liable for personal injuries sustained by Spence, by reason of the negligence of either the conductor or engineer, or as the result of their combined negligence.

The general rule is well settled that, where the particular duties to be discharged require the services of several persons, as in the movement of railway trains, the safety of the employe depends not only upon his own individual skill and prudence, but likewise upon the caution and competency of other persons associated with him in the business, and the employe assumes the risk of danger not only from his own negligence, but likewise from the negligence of his fellow-servants. But this

general rule exempting the employer from liability to one servant for injuries sustained in consequence of the negligence of his fellow-servant, does not apply when it appears from the facts in the case that an employe in a subordinate position has been injured by the negligence or improper conduct of another servant, placed by the master in a superior position over the former, and where such inferior servant is made subject to the orders of such superior, and when the injury occurs during the performance of their duties. A servant who is in a position of authority over the subordinate servant, is not, in the sense of the law, a fellow-servant in a common employment, but represents the master, who is liable for his negligence. The reason for this rule, stated by Judge McFarland, in *Railroad v. Wheless*, 10 Lea, 746, is based, not upon the idea of the relative rank of the two servants or the general superiority of the one in position, intelligence, or skill, or in the wages received, but upon the ground that the one is placed under the orders and directions of the other, and required to submit to and obey such orders in the performance of his duties; that the inferior is placed in the position of a servant to the superior. In such cases the superior is held to represent the master.

In the case of *Lahr v. Railroad*, 2 Pickle, 340, Judge Lurton said, viz.: "Where the inferior is injured while executing a lawful command of his superior, or where the superior represents and stands

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for the master, and has a right to control the movements of the train and of all the employes, in all such cases the rule of *respondet superior* applies with reference to any injury resulting from the official negligence of such superior." See, also, *Railroad v. Bowler*, 9 Heis., 866; *Railroad v. Collins*, 1 Pickle, 227.

Says Judge Cooper, in *Railroad v. Handman*, 13 Lea, 423: "In order to charge the master, the superior servant must so far stand in the place of the master as to be charged in the particular matter with the performance of a duty toward the inferior servant which, under the law, the master owes to such servant." To the same effect is the statement of the rule by Judge McFarland, who says: "The plaintiff must show that his injury resulted from the carelessness or want of skill of some one who, in the particular matter, stands in the place of the master." *Railroad v. Wheelless*, 10 Lea, 748.

Judge Lurton, in *Mining Co. v. Davis*, 6 Pickle, 718, says: "Where there is proof tending to show negligence of a superior servant, whereby an inferior servant has been injured, the jury should be instructed that the mere superiority of grade or rank will not determine the liability of the common employer, but that they must look and see whether the negligence was in regard to some duty to the inferior imposed by law upon the master, and by the master intrusted to the negligent superior servant. If this be so, then the

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rule of *respondere superior* applies, for such a superior stands in the shoes of the master, and is a vice-principal."

The cardinal inquiry, then, that arises on this record is whether the defendant company owed any duty to the plaintiff's intestate the performance whereof was intrusted to the conductor, and whether the injuries were sustained in consequence of a violation of that duty? It will be conceded that it is the duty of a railroad company to regulate the movement of its trains so that those moving in opposite directions will not come in collision. As stated by the Court in *Keary v. Railroad*, 3 Ohio, "from the very nature of the contract of service between the company and its employes, the company is under obligations to them to superintend and control, with care and skill, the dangerous force employed, upon which their safety so essentially depends. For this purpose," said the Court, "the conductor is employed, and in this he directly represents the company. They contract for and engage his care and skill. They commission him to exercise that dominion over the operations of the train which essentially pertains to the prerogatives of the owner, and, in its exercise, he stands in the place of the owner in the discharge of a duty which the owner, as a man and as a party to the contract of service, owes to those placed under him, and whose lives may depend on his fidelity."

It necessarily follows that a conductor placed

in charge of a freight-train, with authority to direct and control its movements, is a representative of the company, charged with the performance of a duty which the company owes to the public and its employes on the train.

That the conductor was the superior of the fireman, and in full charge of the freight-train, we think is abundantly shown in the testimony of J. A. Frates, the train-dispatcher of defendant, A. H. Ellington, the conductor of the collided passenger-train, Wiggins, the division superintendent, and other railroad employes who were examined as witnesses.

Ellington testified, viz.: "The engineer had no right to run by Oakfield, and the conductor had the right, and it was his duty, to have stopped the engineer in passing Oakfield; he had the authority, and ought to have stopped him." Again he says: "If on approach to Oakfield the engineer blew off brakes, the conductor should have stopped him, and after he got past he ought to have stopped him."

J. A. Frates, the train-dispatcher, testified: "If he [the conductor] did not have time to make Medina, it would have been his duty to see that the train was stopped at Oakfield, and get out of the way; to signal the engineer to stop, and see that the brakes were applied. Again, he should have arrived at Oakfield, and been on the side-track, five minutes before the schedule time of the passenger-train." Again, he was asked if he (the conductor)

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had authority to stop the train, to which he replied in the affirmative.

N. D. Wiggins, division superintendent, testified that it was the duty of the conductor to have signaled him to stop.

W. B. Dunn, a freight conductor, testified "that if the engineer attempted to pass on, it was the duty of the conductor to try to stop him."

Rule 4 of the company is, viz.: "Engineers are required to obey the orders of conductors when not contrary to the spirit of these rules."

Rule 91: "Conductors will be held accountable for the conduct of their trainmen."

This evidence, we think, sufficiently shows the relation of the conductor to the company and the other employes, which was that of a vice-principal and representative of the company.

In the case of *Railway Co. v. Keary*, 3 Ohio St., 201, it was held that when a brakeman in the employ of a railroad company, on a train under the control of a conductor having exclusive command, was injured by the carelessness of the conductor, the company was responsible; holding that the conductor, in such case, was the sole and immediate representative of the company, upon whom rested the obligation to manage the train with skill and care.

The case of the *Chicago & Milwaukee Railroad v. Ross*, 112 U. S., 390, was an action brought by a locomotive engineer to recover damages for injuries received in a collision, which was caused

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by the negligence of the conductor of the train. The negligence of the conductor was in failing to show to the engineer the order which he had received to stop the train at South Minneapolis until the gravel-train, coming on the same road from an opposite direction, had passed, and the engineer, in ignorance of the approach of the gravel-train, went forward, and the collision occurred. It was held that the conductor and engineer, though both employes, were not fellow servants; that the conductor was the representative of the company, standing in its place and stead in the running of the train, and that the engineer was, in that particular, his subordinate, and that for the former's negligence, by which the latter was injured, the company was responsible.

It is claimed by counsel for appellant, in their brief, that the Ross case has been virtually overruled by a recent decision of the United States Supreme Court, in the case of the *Baltimore & Ohio R. R. Co. v. Baugh*, decided May 1, 1893. We have carefully examined that case, and do not find that it overrules the Ross case.

The Ross case is in entire harmony with the adjudications of this Court, and has been heretofore cited with approval. *Railroad v. DeArmond*, 2 Pickle, 78. The case of *Railroad v. Kenley*, 8 Pickle, 207, is the most recent enunciation by this Court of the principles involved in this case. In that case it appeared that a brakeman had sustained personal injuries in consequence

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of a defective foot-rest attached to the caboose, and used by the brakeman in ascending to the top of the car. The brakeman had made complaint to the conductor of his train that the foot-rest was defective, and the question presented for decision was whether notice to the conductor was notice to the company. It was contended that the conductor had no power or agency in the construction or repairing of cars, and that notice should have been served upon the car-inspector or master of trains. The Court held that the conductor was the immediate superior of the brakeman, and his assurance that the matter would be remedied is, in law, to be imputed to the master. As the vice-principal, in charge of the train and as to the crew operating the train, notice to him was notice to the master, and an assurance of remedy, made upon complaint of one of his subordinates, and in regard to an appliance upon his own train, was an act within the sphere of his duty toward his inferior.

The record shows that, as this freight-train approached Oakfield, the brakes were applied by the trainmen, in accordance with their usual custom on reaching that station, but the engineer gave a signal to let the brakes off, and the train, without stopping at Oakfield, passed on to the place of the accident. The conductor, in permitting his freight-train to pass Oakfield, in violation of the time-card rules, was guilty of official negligence, which, in law, is imputed to the company. It is

strenuously insisted by counsel for the company that the negligence of Hillsman, the engineer of the freight-train, in passing Oakfield in violation of the time-card rule, was the proximate cause of the accident, and that, as Hillsman, the engineer, and Spence, the deceased fireman, were fellow-servants, the company is not liable. This position cannot be maintained, for the reason that we find from the record that the conductor, as the immediate vice-principal and representative of the company, was in command of this train, and his official negligence is shown to have materially contributed to bring about the disaster.

The rule, as stated by Mr. Thompson in his work on Negligence, Vol. II., page 981, is, viz.: "If the negligence of the master combines with the negligence of a fellow-servant, and the two contribute to the injury, the servant injured may recover damages of the master." This rule was approved by this Court in *Railroad v. Kenley*, decided at Nashville, and reported in 8 Pickle. Judge Lurton, in that case, stated that the reason of the rule is obvious. The servant contracts to assume the dangers incident to the negligence of his fellow-servant, but he does not and cannot contract to assume the risk of the negligence of the master. Not agreeing to assume any part of the negligence of the master, if such negligence proximately contributes to his injury, he may recover, notwithstanding his injury was due to the combined negligence of the master and his fellow-servant."

The next assignment of error is as follows: "*Third.*—Error in Court charging railroads are operated through their employes, and whenever *any* employe is guilty of *any* fault or negligence, that is the fault of the company itself, and when a party is injured because of that negligence, under certain circumstances he can recover."

This language was used by the Circuit Judge in opening his charge to the jury, and when considered in connection with the language that immediately follows, it is fully explained, and could not have misled the jury. The very next sentence following the objectionable paragraph is, viz.: "The rule of law in this State is, where a person is injured by the fault or negligence of a fellow-servant then no recovery can be had. The engineer and fireman," the Court continues, "in charge of an engine are fellow-servants, and whenever the accident is brought about alone by the fault or negligence of the engineer, then no recovery can be had."

We find no error in the instructions given by the Court, nor in its refusal to charge as requested, but consider the charge a sound exposition of the law of the case.

It is next assigned as error that the Court erred in excluding evidence, viz.: Defendant's counsel asked the witness, Poe, "if Hillsman [the engineer] had been looking, state whether he could have seen the other train." While the Court sustained the plaintiff's objection, the de-

fendant, in the very next answer, got the benefit of the testimony desired. The next question asked Poe was as follows:

"*Ques.* How was the road there?"

"*Ans.* We were on a straight line."

"*Ques.* How far ahead could he [Hillsman, the engineer] have seen on that straight line?"

"*Ans.* He could have seen nearly a quarter of a mile."

"*Ques.* Could he have seen ahead if he had been looking?"

"*Ans.* Yes, sir; he could have seen further around than the other train [men] could."

The next assignment of error is based upon the charge in respect to the measure of damages, viz.: "That in estimating the damages, the jury should look to the proof as to what was the expectancy of life of the deceased, and see what amount he was able to and was earning at and before his death, and from all the proof * * decide what he would have earned during that expectancy of life from the time of his death, and then allow her such sum as would reasonably compensate her for the loss of what he would have earned during that expectancy of life from the time of his death."

This charge was erroneous. It was perfectly competent for the plaintiff to prove the expectancy of life of the deceased, his capacity for earning money, his habits, age, and condition. But it was erroneous for the Court to charge that they must "*decide what he [the deceased] would have earned*"

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during that expectancy of life from the time of his death, and then allow her such sum as would reasonably compensate her for the loss of what he would have earned during that expectancy of life from the time of his death."

The assessment of damages in actions of this character does not admit of fixed rules and mathematical precision, but is a matter left to the sound discretion of the jury. The Courts refuse to lay down any cast-iron rules or mathematical formula by which such damages are to be ciphered out by juries. It is the duty of the Court to point out the different elements proper to be considered in the assessment of damages, but it is erroneous to give the jury a rule by which to figure out the damages as they would a mathematical problem in cases like this, where the future earnings of the deceased and his expectation of life are mere probabilities.

As stated by Judge Snodgrass in *Railroad v. Stacker*, 2 Pickle, 353, "the age, condition, capacity of earning money, and expectation of life are all to be considered," but the Circuit Judge, in this instruction, tells the jury they must *decide* what the deceased would have earned during that expectancy of life, and allow his widow compensation for the loss of what he would have earned.

The amount deceased would have earned during his expectation of life was purely a matter of speculation, and his expectation of life was a mere probability.

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This instruction ignores the fact that plaintiff's intestate was engaged in a most hazardous occupation, and that his expectation of life while it was exposed to the perils of railroad service, was more precarious than if he had been engaged in some less dangerous employment. The wages he would have earned were contingent upon his enjoyment of this precarious expectation of life, upon the constancy of his employment, and upon the performance of his duties with regularity and satisfaction to his employer.

The objection to the charge is that both elements of damages are treated as assured facts, and the jury were invited to calculate the damages by this uncertain standard, instead of leaving the assessment of the damages to their sound discretion, upon a consideration of all the elements of damages admitted in evidence.

For the error indicated, the judgment must be reversed and the cause remanded for a new trial.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1893.

RELIANCE COAL, ETC., Co. v. KENTUCKY COAL, ETC., Co.

(Knoxville. September 16, 1893.)

1. LEASE. *Reservation in lease of coal lands touching ways and structures construed.*

A clause in a lease of coal lands, reserving to the lessors such portions of the leased lands as may be necessary for roads, railways, water-ways, side-tracks, and other structures necessary for the profitable working of other lands of the lessor, but not to injuriously interfere with the lessee, applies only to surface-ways and structures, and does not authorize underground entries and ways or the establishment of tipples, chutes, and other mining conveniences, in the absence of express terms to the contrary, since such ways are not of necessity.

Case cited and approved: *Pearne v. Coal, etc., M. & M. Co.*, 90 Tenn., 629.

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2. SAME. *Same.*

A reservation in a lease of coal lands, retaining to the lessor or its assigns the joint use with the lessee of all such portions of the land as may be necessary for roads, tracks, or structures for the profitable working of other lands in the vicinity, does not authorize a structure designed for the exclusive use of the lessor's assigns.

FROM CLAIBORNE.

Appeal from Chancery Court of Claiborne County.
JOHN P. SMITH, Ch.

H. M. CARR, G. W. SAULSBERRY, and LUCKEY &
SANDFORD for Complainant.

JESSE L. ROGERS for Respondent.

WILKES, J. Complainant and defendant are lessees from the American Association (limited) of adjoining tracts of coal land in Claiborne County, complainant's lease being of date August 8, 1891, and covering what is called in the record lease No. 7, while defendant's lease is dated September 29, 1891, and covers what is called lease No. 9.

The lease to complainant provides, among other things, that it shall have the exclusive right and privilege of mining coal upon the property leased, and that it shall, at all times during the lease, peaceably and quietly hold and enjoy the premises leased, without any let or hinderance from the lessor or

its assigns, or any other persons lawfully claiming the same, or any part thereof. It also provides for a minimum royalty or dead rental of \$5,000 per year for each year after the first, or a minimum annual rental of ten dollars per acre, and covers about 500 acres of ground.

The fourth paragraph of the lease contains this language: "Said first party [meaning lessor] retains and reserves the right * * * to build and construct houses, roads, railways, tramways, quarries, brick-works, saw-mills, or other works or improvements, or to farm thereon all land not used or required by the second party for its works, which work is to have first consideration and preference."

The fifth clause contains: "The party of the first part [to wit, the lessor] retains the right, for itself or its assigns, to the joint use, during the continuance of this lease, of all such portions of the above described lands as may be necessary for roads, railways, water-ways, side-tracks, and other structures necessary for the profitable working of other lands of the party of the first part, or its assigns, in the vicinity of the above leased premises, but not to injuriously interfere with the working of the party of the second part," etc.

In the lease to defendants of lot No. 9, these words of conveyance are also used, to wit: "All such rights of making entries and erecting structures for mining purposes under, through, and upon the premises adjoining the above, known as lease

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No. 7, as the party of the first part is competent to grant."

On the property leased by complainant, defendant began opening an entry through and under the surface; also began the construction of a side-track at the opening of the entry, about 500 feet in length, and is proposing to erect a tippie and coal-chute for the purpose of loading its coal into cars at the opening of the entry, and was cutting timber and removing coal from the premises of complainant. Whereupon, this bill was filed to enjoin defendant from the further opening of entries and the commission of any further trespasses, and from disposing of the coal taken out of the entry, and for an account.

Defendant admits that it had commenced to open the entry, as stated, along the coal seam on complainant's property; that it intended to make an entry sixteen feet wide for the distance of one hundred feet, and then to drive a cross entry, at right-angles, nine feet wide, until it reached its own premises, and that, in so doing, it was taking the coal out of the entry as it progressed, just as it would dirt, stone, or any other material obstructing the way, and it claimed the right to do this under the clauses of the leases heretofore set out.

On the trial of the cause, after much proof was taken, the Chancellor held that the complainant was entitled to no relief; that the defendant had the right to make necessary roads, railways, water-ways, side-tracks, or other structures over or

through the tract of land leased to complainant necessary for the profitable working of the lands leased to the defendant, but so as to not injuriously affect or interfere with the working of complainant on his leased premises. .

The Court further found and decreed that such way as the defendant was making through complainant's land was necessary for the working profitably of the coal on defendant's land, and that said way, as well as the side-track that the defendant was constructing at its entry at the time of the filing of the bill in this case, would not injuriously interfere with the working of the complainant on its premises. The injunction was thereupon dissolved, and defendant was permitted to proceed with its work, under the direction of the Court, and complainant was taxed with the costs. From this decree complainant appealed, and has assigned errors.

First, that the Chancellor erred in finding that the way, as defendant was making the same through complainant's lease, was necessary for the profitable working of the coal on defendant's lease.

Upon this question of fact the proof is very conflicting, and the contention of each party is well sustained by the testimony of mining and engineering experts. After a careful examination of the entire testimony, we are of opinion the Chancellor is not sustained by the weight of the testimony. Under the proof it is apparent that the opening of the way as proposed by defendant

would be very advantageous to it, and that by the use of such way its property could be more profitably, easily, and conveniently worked; but we are not convinced that such way is necessary for the profitable working of the coal on defendant's premises, in the sense that no other way is open for its profitable operation; but the weight of testimony is that the coal on defendant's leased premises may be profitably, but not so conveniently, worked without making use of this way. We consider this established by the testimony of Jackson, Dickson, Park, and, to some extent, conceded by defendant and its witnesses.

The second assignment is, that the Chancellor erred in finding that the way, as the same was being opened by defendant through complainant's lease, together with the side-tracks that defendant was constructing at its entry, would not injuriously interfere with the working of complainant's premises.

Upon this question of fact there is likewise great conflict of apparently reliable testimony; and it is remarkable that competent, reliable, intelligent witnesses, many of them experts with large experience and ample opportunities of knowledge, should differ so widely from each other. We are fully satisfied, however, that the entry proposed to be made, and the side-tracks proposed to be laid, and the tipple, chute, and other appurtenances of the mining plant proposed to be erected and built on complainant's premises by the defendant, would

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materially interfere with, damage, and injure complainant in its rights under its lease, by occupying one of the most eligible sites on its lease, to its own exclusion; by taking out coal from complainant's premises which it has the right to mine; by erecting structures and a mining plant for defendant's use on complainant's land, to the exclusion and prejudice of complainant in erecting a similar plant.

The third assignment of error is, that the Chancellor erred in holding that defendant had the right to make necessary roads, railways, waterways, side-tracks, or other structures over or *through* complainant's premises.

This assignment involves the proper construction of the provisions of the two leases, portions of which have been heretofore set out. While we may look to the language used in the lease to defendant to ascertain its rights as against its lessor, it is evident that, being of a later date than complainant's lease, it cannot prejudice the same.

It will be observed that only the fifth clause of the lease relates to the reservations made in favor of the lessor or its assigns in regard to contiguous property, clause No. 4 relating to such reservations as were made to the lessor in the premises therein leased—the latter relating to the premises leased and the former to premises in the vicinity of that leased.

Looking to the language of this clause, we are of opinion that it relates only to such surface

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ways over the leased premises as are necessary for the purposes of ingress and egress to the surface of other properties adjacent or in the vicinity, and does not relate to or embrace underground entries through the leased premises, and the terms railways, water-ways, side-tracks, and other structures necessary for the profitable working of other lands in the vicinity, mean such surface ways and structures as are necessary for such ingress and egress.

To hold that, under this language, underground entries could be made by defendant on complainant's premises, and underground ways could be cut through the coal under its surface, and that tip-ple, chutes, and other conveniences of a mining plant could be established on complainant's land, would be to subject it to such a servitude as would greatly damage, if not totally destroy, its value. If this were so, and complainant's premises were favorably located, then it would follow that entries could be run under its surface in every direction that might be beneficial to other properties in the vicinity, and it might be made the common center of mining plants for all the property in its vicinity, to the great damage or utter destruction of complainant's rights under its lease. Such incumbrances and servitudes cannot arise unless they are expressly provided for, and reservations to that extent are made in plain, unambiguous terms. Such rights do not arise in favor of contiguous land-owners by implication of law, and such ways are not ways of necessity, and the question is not

one of convenience, but one of necessity. *Pearne v. Coal Creek Mining and Manufacturing Co.*, 6 Pickle, 629.

For the same reason and upon the same grounds the fourth assignment of errors is well made, and must be sustained. This assignment is, that the Chancellor erred in finding that the entries, side-tracks, tipples, and other structures in process of erection by defendant on complainant's lease, came within the reservation clause in complainant's lease providing for road, railways, water-ways, side-tracks, and other structures as therein specified.

This language in complainant's lease cannot be enlarged or in anywise altered by that put in the lease to defendant, to wit: "That the defendant should have all such rights of making entries and erecting structures for mining purposes *under, through,* and upon the premises of complainant as the lessor was competent to grant."

The lessor could grant no rights over complainant's premises other than in strict conformity with the reservations made in complainant's lease.

Again, the reservation, under the fifth clause, retains the right to the lessor or its assigns to the *joint use* of all such portions of the lands as may be necessary for roads, railways, water-ways, side-tracks, and other structures necessary for the profitable working of other lands in the vicinity, etc. There is no reservation of any way, track, structure, or road to be used *exclusively* by an owner of other property, but the reservation is only

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for the *joint use* of such owner and complainant. It will hardly be contended that the entry proposed to be made by defendant under complainant's land, and the side-tracks and mining plant intended to be built by it, are intended for the joint use of itself and complainant; but they are designed for defendant's exclusive use, and are not authorized under the reservations in complainant's lease.

It follows that the Chancellor was in error in refusing relief to complainant, and his decree is reversed, and the injunction prayed in the Court below will be made perpetual. Defendant will pay the costs of this and the lower Court, and the cause is remanded for an account of the coal mined, timber cut, and waste committed on complainant's premises by defendant.

Chadwell v. Chadwell.

CHADWELL v. CHADWELL.

(*Knoxville*. September 19, 1893.)

BOUNDARY. *Estoppel as to.*

A land-owner and his heir are estopped to dispute the correctness of a boundary line established by the former and asserted or acquiesced in by both for a period of thirteen years, during which the adjoining lands have been purchased to and upon faith of that line, especially where the line has been established in conformity to the more reasonable construction of the conflicting calls of the title-papers of the adjacent owners.

Cases cited and approved: *Spears v. Walker*, 1 Head, 165; *Merriwether v. Larmon*, 3 Sneed, 447.

FROM CAMPBELL.

Appeal from Chancery Court of Campbell County.
H. R. GIBSON, Ch.

SCHLOSSHAN & AGEE and JAMES A. FOWLER for
Complainants.

HENDERSON & JOUROLMON for Respondents.

WILKES, J. The controversy in this case involves the ownership and true boundaries of a tract of land in Campbell County. The land is embraced within what is known in the record as the Alvis Kincaid five thousand acre survey.

Chadwell v. Chadwell.

Prior to February 24, 1862, Kincaid, for a consideration of twelve dollars, conveyed to Sterling Rutherford a portion of this five thousand acre tract by the following boundaries: "Beginning on the top of Peter Huddleston's ridge, where the Buck Gravely line crosses the same; then with the top of the Log Mountain, a north-east course to Cooper's line; thence with Cooper's line, crossing Davis Creek, to Gravely's line on the side of the Brushy Mountain; thence with Gravely's line to the beginning, containing one hundred acres, more or less."

On March 15, 1868, Rutherford conveyed to Clepper a portion of this tract by general boundaries, as follows: "Beginning on top of Peter Huddleston's ridge, where Buck Gravely's line crosses the same; thence with the top of Log Mountain to a locust and oak, near a gap in the Log Mountain; thence a north-west course, crossing Davis Creek, to a chestnut and black gum on the bank of the creek; thence a north-west course to the Gravely line on the side of Brushy Mountain; thence with Gravely's line to the beginning, containing twenty-five acres, more or less." This tract contains, however, by actual survey, 350 acres.

On March 15, 1871, Rutherford conveyed to I. R. Dew the remainder of the tract which had been conveyed to him by Kincaid, lying east of that portion deeded to Clepper, and the metes and bounds are set out in this conveyance.

In October, 1871, Dew conveyed the same land

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to Wm. Allen, and Allen conveyed the same to the Big Creek Gap Coal and Iron Company on March 14, 1889.

In the meantime, September 5, 1870, Kincaid conveyed to Duff Chadwell all of the five thousand acre tract that he had not previously conveyed to Rutherford, or other parties.

The contest arises over the lands now claimed by the Big Creek Gap Coal and Iron Company, and turns upon the question whether these lands are included in the boundaries of the land conveyed to Rutherford, or whether they are a part of the residue of the five thousand acre tract which passed under the conveyance to Duff Chadwell.

The Chancellor held:

First.—That the lands belonged to the company.

Second.—That the calls of the deed from Kincaid to Rutherford ran with the top of Log Mountain in a north-easterly direction, as indicated on a map filed in the record, and not in a north-west direction, as contended by complainants, and these calls include the lands in controversy.

Third.—That Duff Chadwell and Rutherford agreed upon and fixed a line running from the beginning corner, north 45 east 700 poles, as the boundary line of the Rutherford tract, and that Chadwell recognized this line as correct for a long number of years, and that it has been so recognized by complainants until recently, before the bringing of this suit, and that complainants are now estopped to dispute the line thus established.

Fourth.—That complainants had wholly failed to show any actual inclosures and adverse possession of any of the lands in controversy.

Complainants' bill, so far as it raised the question of the title to this land, was dismissed, and complainants have appealed and assigned errors.

The first error assigned raises the question as to what is meant by the first call in the Rutherford deed, to wit: "Running then with the top of Log Mountain a north-east course to Cooper's line," etc. There is no dispute about the exact location of the beginning corner, but complainants insist that the line runs from this beginning corner along the top of Huddleston's ridge to what they term Log Mountain proper; thence with the top of Log Mountain proper to Cooper's line, and that this carries the line at first in a north-east direction, but afterwards in a north-west direction. It is conceded that the line thus run would embrace an area of about four hundred and fifty acres, instead of one hundred, as the Rutherford deed calls for, and, thus run, would be virtually the same as the calls of the deed to Clepper.

Defendants insist, on the contrary, that the line continues in a north-east direction until it strikes Cooper's line at a different point; and it is shown that the area contained in the lines thus run would be about one thousand to one thousand two hundred acres. In corroboration of their contention, complainants insist that by the description given in the Rutherford deed, the land lies on Davis

Creek, and that, if the boundaries are as claimed by defendants, then the lands lie on Hog Camp Branch and Patty Murray Branch, two streams of considerable importance, and too well known to be overlooked in the description of the land; but defendants insist that these two branches are but tributaries of Davis Creek, and there is no misdescription or confusion in the location calls.

The main contention arises over what is "Log Mountain." Complainants' claim is that it is a ridge which runs down in a north-westerly direction to Davis Creek, according to the calls of the Clepper deed, while defendants say that this is only a spur of Log Mountain, and that the mountain proper runs in a north-east direction from the beginning corner. By either contention Peter Hudleston's ridge is a part or section of Log Mountain, and the beginning corner is agreed upon, and not in dispute.

The Chancellor held that the line ran north-east along the top of the mountain, as insisted by defendants, and not north-west along the spur, as contended by complainants; and, while there is some contradiction and uncertainty in the testimony, we are of opinion he was correct in so holding.

The second error assigned is to the holding of the Court that Duff Chadwell, the ancestor of complainants, and through whom they derive title by descent, agreed with Rutherford upon a conventional line, and established the same in 1871, and afterwards recognized the same.

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We think the evidence is quite plain that when Rutherford was offering this land for sale to Dew in 1871, it was done in the presence of Duff Chadwell, and that Rutherford indicated its location by pointing in the direction of the lands in dispute, and that Chadwell not only did not raise any question, but agreed to and conceded its correctness.

Dew, however, desired to have the lands surveyed, and conveyed to him by metes and bounds; and thereupon, John B. Chadwell, son of Duff Chadwell, and one of the principal complainants in this cause, was employed to survey the lands and ascertain the boundaries.

John B. Chadwell, it seems, was Deputy County Surveyor at the time, and was selected in preference over the County Surveyor to do the work by the several parties interested. He made the survey. Both Rutherford and Duff Chadwell were present, and a controversy arose between them over the direction of the first line, Rutherford insisting that it should run in a south-easterly direction, but on the top of Log Mountain, while Chadwell insisted that, inasmuch as the call was north-east, it should be run north 45 east, which would make a straight line, sometimes running with the top and sometimes on the side of the mountain near the top. Chadwell prevailed in his contention, and the line was run at 45 east, and Duff Chadwell, for a great portion, if not the entire length of the line, marked it plainly through the woods with a hatchet in his own hands. The line

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of the survey was thus fixed and marked, and by it the deed was made from Rutherford to Dew and from Dew to Allen and from Allen to the Big Creek Coal and Iron Company, and for thirteen years Duff Chadwell recognized it as the boundary, and recognized the land as the land of Allen. We think, from the proof, that complainants, up to within a short time of the filing of this bill, also recognized this as the correct or established line.

This line having been established by Chadwell himself, against the contention of Rutherford, and Dew having bought with reference to it, complainants, as the heirs of Chadwell, are now estopped to deny it. *Spears v. Walker*, 1 Head, 165; *Merrivether v. Lannon*, 3 Sneed, 347, and other cases in accord.

We do not think the contention of complainants, that any portion of the land claimed by the Big Creek Coal and Iron Company was adversely held by them or any one else as against the Rutherford and Dew title, is sustained by the record.

We conclude that there is no error in the decree of the Chancellor, and the supplemental bill, which raises the question of title as to this land, is dismissed at complainants' cost, and the cause is remanded to the Court below for such further proceedings under the original partition bill as the parties desire to take with reference to the lands other than those decreed to the Big Creek Coal and Iron Company.

Bank v. Morristown.

BANK v. MORRISTOWN.

(*Knoxville.* September 23, 1893.)

TAXATION. *Exemption of \$1,000.*

Each citizen, whether a married woman or other person, owning taxable personal property is entitled to exemption out of same to the extent of \$1,000 from State, county, and municipal taxation.

Constitution construed: Art. II., Sec. 28.

Acts construed: Acts 1891, Ch. 26, Sec. 1, Subsec. 6 (Ex. Sess.).

FROM HAMBLEN.

Appeal from Chancery Court of Hamblen County.
JNO. P. SMITH, Ch.

SHIELDS & MOUNTCASTLE for Bank.

McFARLAND & YOE for Morristown.

CALDWELL, J. The bill in this cause was filed by the First National Bank of Morristown and certain of its stockholders against the Mayor and Aldermen of Morristown and its tax-collector, to restrain the collection of certain taxes alleged to have been illegally assessed by the said municipality upon shares of stock in said bank.

The defendants demurred to the bill, their demurrer was overruled, and, by special leave of the Chancellor, they have appealed to this Court.

Complainants allege, in substance, that the First National Bank of Morristown is a national banking corporation, organized and doing business as a national bank under the laws of the United States, with its *situs* within the corporate limits of the town of Morristown, in the county of Hamblen, and State of Tennessee; that its capital stock of \$75,000 is divided into equal shares of \$100 each, for which certificates have been issued to different owners, according to their respective interests; that among the numerous owners and holders of stock certificates are several married women, living with their husbands; that some of the stockholders reside within the corporate limits of Morristown, some without those limits, but in Hamblen County, and others in other counties of this State.

Complainants further allege, in substance, that the Mayor and Aldermen of the town of Morristown by ordinance, and its tax-assessor by actual assessment made, had declared all of said bank stock subject to municipal taxation for the year 1893, and wrongfully refused any exemption whatever to married women owning parts of said stock, whether residing within or without the corporate limits of said town, and to other stockholders residing without said corporate limits, though expressly requested so to do, and notwithstanding the fact that none of such persons had anywhere

claimed or been allowed any exemption from municipal taxation on other personal property.

Complainants allege, finally, that \$1,000 of the stock belonging to each of said owners should have been exempted from taxation under the law, and that the assessment in question, so far as made upon the first \$1,000 of the stock of each owner, was illegal and void; that, having paid all the rest of the taxes assessed against them, the stockholders are entitled to have the collection of the illegal part restrained by injunction.

The prayer for relief is appropriate to the facts alleged.

The principal grounds of demurrer are, in substance, as follows:

First.—That there is no exemption from taxation to the wife, where \$1,000 worth of personal property has been exempted to the husband, two exemptions not being allowable to the same family.

Second.—That the exemption claimed can be granted to no one, "except against taxes assessed by the government where the party resides."

The demurrer was properly overruled.

One requirement of the revenue section of our Constitution is, that the Legislature shall except from taxation "\$1,000 worth of personal property in the hands of each tax-payer." Const. 1870, Art. II., Sec. 28.

In obedience to that requirement, the Legislature has from time to time, in each general assessment act, expressly declared the exemption. For the

statute. in force when the assessment here complained of was made, see Acts of 1891, Extra Session, Ch. 26, Sec. 1, Sub-sec. 6.

Every citizen, whether married woman or other person, who owns personal property in the State, otherwise subject to taxation, falls directly within the constitutional and statutory provision, and is entitled to the exemption contemplated. The exemption is to "each tax-payer," not to each head of a family, nor to each person residing within the particular town or county in which the assessment may be made. No citizen answering the designation of "*tax-payer*" is excluded from the exemption. "Each tax-payer," without exception, is entitled to its benefit; that is, each citizen owning taxable personal property is entitled to the exemption.

The citizen owning the property, and to whom it may be rightfully assessed, is the *tax-payer*, and, as such, is the person for whose benefit the exemption is provided, whether that person be a married or unmarried woman, a resident of the particular town or county in which the assessment is made, or of some other part of the State. The citizen's ownership of personal property otherwise subject to taxation, is the criterion by which his or her right to the exemption is to be determined; and wheresoever the property is taxable, there the owner should be allowed the exemption, unless it has been allowed elsewhere on other taxable personalty.

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The exemption is from State, county, and municipal taxation—from all alike. Neither State, county, nor municipality can exercise the taxing power against the owner of personal property, without, at the same time, allowing him the constitutional exemption.

The language of the Constitution is so clear and mandatory as to admit of neither doubt nor evasion.

Affirm and remand for answer.

Guy v. Lumber Co.

GUY v. LUMBER COMPANY.

(*Knoxville*. September 28, 1893.)

EVIDENCE. *Not admissible, when.*

A judgment defeating a father's suit for personal injuries to his minor child, upon the ground that they were not inflicted by defendant's negligence, but by that of an independent contractor operating his mill, is not competent evidence for defendant to support the same defense in a subsequent suit brought by the minor against the same party for the same injury.

Case cited : *Powell v. Construction Co.*, 88 Tenn., 692.

FROM ANDERSON.

Appeal in error from the Circuit Court of
Anderson County. W. R. HICKS, J.

JAMES A. FOWLER and W. L. WELCKER for Guy.

C. J. SAWYERS and HENDERSON & JOUROLMON for
Lumber Company.

CALDWELL, J. Alexander Guy, as next friend of
Charles Guy, brought this action against the Fisher
& Burnett Lumber Company, to recover damages
for personal injuries alleged to have been negli-
gently inflicted upon the said Charles Guy by the

defendant while he was in its employment as a laborer at its mill.

Trial before Court and jury resulted in verdict and judgment for the defendant, and plaintiff appealed in error.

Charles Guy, for whose benefit this action is prosecuted, was a minor, thirteen years of age at the time he received the injuries complained of in the declaration, and he is still a minor, under the age of twenty-one years.

Soon after the injuries were inflicted, the father of Charles Guy brought suit against the Fisher & Burnett Lumber Company, in his own right, to recover damages resulting to him from loss of services, etc.

That suit was successfully defended in the Circuit Court and in this Court. In affirming the judgment of the Circuit Court in that case, this Court adjudged that one Hugh Bailey, who had engaged the services of Charles Guy, was an *independent contractor*, and that the defendant was, for that reason, not responsible for the injuries sued for.

One defense made before the jury in the present action was, that Charles Guy was not in the employment of the defendant, but in the service of Hugh Bailey, an alleged independent contractor, at the time the injuries complained of were received.

In support of that defense, the defendant was permitted, over the objection of the plaintiff, to

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produce in evidence a copy of the judgment of this Court in the former case.

Upon no ground was that judgment competent or admissible as evidence in this case. It would have been competent and admissible as a matter of estoppel, on a plea of *res adjudicata*, in an action between the same parties and about the same subject-matter. But it was not so in this case.

For the error indicated, the judgment is reversed, and the case remanded for a new trial.

On another trial, inaccuracies in the charge of the Court, upon the subject of independent contractor, may be corrected by following the definition given and principles laid down in the case of *Powell v. Construction Company*, 88 Tenn., 692.

 Boyer v. State.

BOYER v. STATE.

(Knoxville. September 28, 1893.)

CRIMINAL PRACTICE. *Erroneous method of charging the jury.*

The Court erroneously invades the province of the jury by stating to them, in his charge in a criminal case, that certain enumerated facts shown in proof, "strongly indicate" the defendant's guilt.

Constitution construed: Art. VI., Sec. 9.

Cases cited and approved: Jones v. Iron Co., 14 Lea, 157; Deihl v. Ottenville, 14 Lea, 191; Cantrell v. Railroad, 90 Tenn., 638; Bank v. Harris, 2 Hum., 311; Ivey v. Hodges, 4 Hum., 154; Kirtland v. Montgomery, 1 Swan, 452.

Cases cited and distinguished: Poe v. State, 10 Lea, 679; Wilcox v. State, 3 Heis., 118; Hughes v. State, 8 Hum., 75.

 FROM COCKE.

Appeal in error from Circuit Court of Cocke County. W. R. HICKS, J.

W. J. McSWEEN, W. O. MIMS, W. H. JONES,
and JONES & GORRELL for Boyer.

Attorney-general PICKLE, W. R. TURNER, and H.
N. CATE for State.

CALDWELL, J. D. W. Boyer and Rufus Holt
were jointly indicted, in the Circuit Court of Cocke

County, for the alleged forgery of a deed, whereby David Boyer seemed to convey a valuable tract of land to his son, the said D. W. Boyer.

They were jointly tried and convicted, and have appealed in error.

The deed in question bears date November 18, 1891, and the signature of David Boyer was proven before the County Court Clerk on the first day of December, 1891, by Rufus Holt and L. H. Holt. David Boyer, the assumed vendor, disappeared from his home, upon the land described, on November 22, 1891, between the date and the probate of the deed, and was never thereafter seen alive by any of the witnesses in the case. His dead body—or what his widow and several other witnesses think was his dead body—was found in a cave near his home, and upon the land conveyed, some time in the month of March, 1892.

Several witnesses, claiming to be acquainted with the signature of David Boyer, testified that his name upon the deed to his son was not in his handwriting; and some were of opinion that it was written by the defendant, D. W. Boyer.

Between the time of the disappearance of David Boyer and the discovery of the dead body in the cave, defendant, D. W. Boyer, told numerous persons that he had bought his father's land, and that his father had left the country.

The widow of David Boyer testified, among other things, that, on the day after he was last seen by her, their son, the defendant, D. W. Boyer,

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said to her that his father "was going to leave the country," and asked her "to fix him up some clothes and something to eat;" that she complied with that request, putting some clothing and food in a black valise; that the said D. W. Boyer went away from home that afternoon, and returned the next day, saying he had taken his father to a town in the adjoining county, whence he had gone "West," promising to write back to them "if he did any good out there;" that she thought the valise and its contents found in the cave with the dead body were the same that she had put up for her husband at the suggestion of their son.

Many other facts and circumstances tending to fix the charge of forgery upon D. W. Boyer, and implicating defendant, Rufus Holt, therein, were disclosed in the testimony before the jury, but they need not be detailed in this opinion. Enough of the testimony has been stated to illustrate a controlling question of law, arising upon the charge of the trial Judge to the jury trying the case.

After instructing the jury, with substantial accuracy as to the general features of the case, the Court further said:

"If you find it to be clearly shown that David Boyer was killed and thrown into a cave on his own farm, where he lay for over three months; that during that time the defendant, D. W. Boyer, repeatedly stated that he had purchased the farm from his father; that the said defendant, after his father was killed, notified his mother that his

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father was going to leave the country, and induced her to make arrangements for his departure; that he, the said defendant, then went away from home, saying to his mother that he was going to take his father to Morristown, in an adjoining county, for his departure from the country, and after returning said that he had so taken his father; and if you further find, as a fact, that the defendant, D. W. Boyer, had the deed shown you probated before the discovery of his father's body, 'you are then told that these are circumstances which strongly indicate both the killing and the forgery of the paper or deed.'"

That instruction is fatally erroneous. By it the Court invades the exclusive province of the jury, and tells them the effect of certain testimony—what weight they shall give it in making up their verdict. The Court had no right to say that the enumerated circumstances, if established by the proof, *strongly indicated* the forgery of the deed. The weight to be given those circumstances was a matter for the determination of the jury alone. 14 Lea, 157; *Ib.*, 191; 90 Tenn., 644.

"Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." Const., Art. VI., Sec. 9; 2 Hum., 311; 4 Hum., 154; 1 Swan, 552.

The instruction quoted above is a charge with respect to matters of fact. It is an imperative direction to the jury as to the effect of certain evidence. It is not a mere statement of the

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testimony and declaration of the law applicable to it.

As a matter of fact the trial Judge may have been right in the position that the facts enumerated by him strongly indicated that the deed had been forged; but that was a conclusion of fact purely, which he was not authorized to state to the jury, and which they alone could rightfully draw.

The law does not fix the weight that shall be given to such facts—no presumption of guilt, as a matter of law, arises from them; hence, their effect cannot be stated as a legal result.

In a prosecution for larceny the Court may properly tell the jury that recent possession, by the defendant, of the stolen articles, if unexplained, "is a strong circumstance tending to show" him to be guilty of the larceny. *Poe v. The State*, 10 Lea, 679; *Wilcox v. The State*, 3 Heis., 118; *Hughes v. The State*, 8 Hum., 75. But that instruction is allowable in such a case, alone upon the ground that recent possession of stolen goods, when unexplained, raises a legal presumption of guilt on the part of the person in whose possession the goods are found. Such an instruction in such a case is, therefore, but a declaration of the law applicable to the facts shown, and not a charge with respect to matters of fact.

Reverse and remand.

Downing v. Dunlap Coal, etc., Co.

DOWNING v. DUNLAP COAL, ETC., CO.

(Knoxville. September 28, 1893.)

SUPERSEDEAS. *Of appointment of receiver.*

A supersedeas is properly granted by a judge of this Court to stay an interlocutory order of a Chancery Court, based alone upon bill, answer, and *ex parte* affidavits, placing a solvent and going corporation in the hands of a receiver pending a suit by the minority of its stockholders, seeking to wind up its affairs, thereby determining, finally, in advance of a hearing on the merits, issues made by the pleadings vital to the interests of the parties, and wresting the management of the corporation from the majority of its stockholders, and changing a deliberate policy of great importance, asserted by the defendants in their answer to have been adopted by assent of complainants.

Cases cited: Railroad v. Huggins, 7 Cold., 217; Mabry v. Ross, 1 Heis., 769; Park v. Meek, 1 Lea, 80; Redmond v. Redmond, 9 Bax., 561; Roberson v. Roberson, 3 Lea, 50; Baird v. Turnpike Co., 1 Lea, 394; Enochs v. Wilson, 11 Lea, 228; Richmond v. Yates, 3 Bax., 204; Cone v. Paute, 12 Heis., 506; Hoge v. Hollister, 8 Bax., 534; Payne v. Johnson, 1 Leg. Rep., 363.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.
T. M. McCONNELL, Ch.

WATKINS & BOGLE and LEWIS SHEPHERD for
Complainants.

CLARK & BROWN for Respondent.

Downing v. Dunlap Coal, etc., Co.

A. D. BRIGHT, Sp. J. This is a motion to discharge a supersedeas of an interlocutory decree pronounced by Chancellor McConnell in the¹ Chancery Court of Hamilton County, Tenn., in the above cause. The supersedeas was granted by Judge Snodgrass, a member of this Court, who prepared, on the application for said supersedeas, a written opinion, setting forth the facts and the law of the case, which opinion we adopt as the opinion of this Court upon said motion.

The motion to discharge the supersedeas is overruled and disallowed by the Court, and complainants, Sheridan and Rhoades, are taxed with costs* of this motion. Said opinion of Judge Snodgrass referred to is hereto appended, and made the opinion of this Court.

SNODGRASS, J. This is an application by the defendant corporation for supersedeas of interlocutory decree of the Chancellor, appointing a receiver and certain adjudications therewith, made by Chancellor McConnell in advance of final hearing and on motion of complainants, Sheridan and Rhoades, supported by affidavits. The orders complained of were made June 3 and July 17, 1893, and are as follows:

First Order.—"The case thereupon came on to be heard on the application (motion formerly made) of

* Held, on application for supersedeas of the execution, to embrace the entire costs of the cause accrued in this Court.—REPORTER.

complainants, O. J. Sheridan and W. J. Rhoades, for the appointment of a receiver of the defendant, the Dunlap Coal, Iron and Railway Company, and, after hearing the affidavits and proofs offered by the defendant as well as by the complainants, and after full argument of said motion by counsel for complainants as well as defendants, the Court finds that said bill is properly filed to wind up said corporation, and to preserve its assets; that it has a large amount of unpaid stock subscriptions due to it, and owes large debts on its land purchases; that said unpaid stock subscriptions constitute a trust fund for the payment of the debts of the corporation, and that they ought to be collected and applied to the payment of said indebtedness.

“And the Court further finds that said corporation is controlled by the stockholders who are indebted to it on their stock subscriptions, and that they have neglected and refused to pay their subscriptions in full or cause said company to bring suits to collect the same; that the paid-up stockholders are justly and equitably entitled to have any balances due on stock subscriptions collected and appropriated to the debts of said company, and the surplus, if any, held in the treasury for the benefit of all stockholders.

And the Court is of opinion and decrees that a receiver be appointed for the Dunlap Coal, Iron and Railway Company. But the Court not being advised who is a proper and suitable person for

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receiver, it is ordered that his selection, and the specification of the powers and authority he shall have, be, and these questions are, reserved for consideration and determination at a special term of the Court to be hereafter called, or at some regular term."

Second Order.—"Be it remembered, that on this the seventeenth day of July, A.D. 1893, it being a day of the special term of said Court, the above entitled cause came on for further decree on the motion of complainants for the appointment of a receiver of the property and assets of the defendant company—the Dunlap Coal, Iron and Railway Company—and for further orders herein; and the parties appearing, and the same being considered by the Court:

"It is ordered, adjudged, and decreed that Halbert B. Case be, and he is hereby, appointed receiver of all and singular the property—real, personal, and mixed—books, papers, minutes, records, notes, accounts, rights, demands, credits, and assets of every kind and description of said defendant, the Dunlap Coal, Iron and Railway Company; and the tenants of all such real estate are required to attorn and pay their rents and dues to said receiver; and said defendants and their agents, officers, and attorneys and representatives, are required to turn over and deliver to said receiver the possession of said real estate, and also all personal property belonging to said defendant company, including all notes, accounts, claims, contracts, sub-

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scription agreements and contracts, books, minutes, records, deeds, bonds, and papers belonging to said defendant company, and especially all contracts and agreements between said company and its stockholders, or any of them, or between its stockholders or any other person, or relating or pertaining to the subscriptions to the capital stock of said company.

"It is further ordered and decreed by the Court that all unpaid subscriptions to the capital stock of said defendant, the Dunlap Coal, Iron and Railway Company, be, and they are hereby, declared due and called in; and said receiver is hereby authorized and directed to proceed to collect in all such unpaid stock subscription contracts for that purpose, and authorized to bring and prosecute all suits and actions in law and in equity, in this Court or elsewhere, which he, in his discretion, deems proper or necessary to be brought or prosecuted in order to collect in such subscriptions; and said receiver is also authorized to bring and prosecute and defend any and all actions necessary or proper, in his judgment, to be brought, prosecuted, or defended; to collect any other debts, claims, or demands owing to said company, or to protect and preserve the property of said company from waste or destruction.

"Before entering upon the discharge of the duties hereby imposed upon him, said receiver will enter into bond, with security, to be approved by the Clerk of this Court, in the sum of \$15,000,

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payable to the said Clerk and Master, for the use of the parties as they may be entitled, and conditioned as required by law, and said bond will be filed herein. Said receiver will, from time to time, pass his accounts, and he shall, at the end of each month, pay in to the Clerk and Master of this Court all balances collected by him, after costs of collection, to be held by said Clerk and Master subject to the orders of this Court. The right is reserved to require additional bond from said receiver at any time the Court may deem the same necessary.

"It is further ordered by the Court that complainants, O. J. Sheridan and W. J. Rhoades, be, and they are hereby, required to enter into bond, in the sum of \$5,000, with security, to be approved by the Clerk and Master of this Court, payable to said Clerk and Master, for the use of the parties as they may be entitled, conditioned to pay the costs and expenses incident to such suits as may be brought by said receiver to collect unpaid subscriptions for stock, in the event said receiver brings such suits and fails to collect enough thereon to pay the expenses incurred by him thereby; and said receiver will not bring any such suits until such bond is filed herein by said Sheridan and Rhoades.

"To this decree of the Court, defendant, Dunlap Coal, Iron and Railway Company, and C. F. Adams except, and are allowed to enter their exception."

The original bill was filed by Downing *et al.* November 18, 1892.

On December 31, 1892, O. J. Sheridan and W. J. Rhoades filed their petition to be made complainants, and were allowed to become such on giving bond for cost, which they at once did on same day.

Nothing was done under this bill. The original complainants agreed to a dismissal of it March 6, 1893, and in pursuance of that agreement, counsel thereby authorized to dismiss, filed written order to that purport.

Thereupon, Complainants Sheridan and Rhoades filed a bill and obtained appointment of a receiver, which is now sought to be superseded. The facts and attitude of the parties may be properly stated now, in connection with their bill.

The complainants, O. J. Sheridan and W. J. Rhoades, are the holders of about one-fifth of the stock of defendant company. As such they bring this bill to have a receiver appointed to take charge of the assets and affairs of the company, collect its unpaid stock and pay its debts, and to wind up the corporation. They ask to be permitted to file it in their own behalf, and that of all other stockholders who may become parties, but no others have as yet joined them in the application.

They aver substantially that the Dunlap Coal, Iron and Railway Company, organized in 1890, with a subscribed capital stock of \$500,000, of

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which complainants took \$100,000, and paid for it in transfer of option contracts and bonds for title of lands. Stock issued to them was non-assessable, but the remaining stock, nearly all, was assessable, and that some assessments had been levied and paid. It shows \$320,000 subject still to assessment of 56 $\frac{2}{3}$ per cent., amounting to about \$180,000 (exact figures are stated, but are not material), and that the holders thereof are nearly all solvent. No question is made in the bill as to solvency of the corporation or its stock subscribers. It is shown that the corporation bought about 10,000 acres of iron land, 10,000 acres of coal land, and about 2,000 acres of town site land, aggregating in value \$375,000, on which it now owes about \$125,000.

Upon this showing its assets largely exceed its liabilities, and it is not sought to be subjected to a change of management or receivership on any theory of insolvency. It is proper to be observed here, too, that this is not a suit of any creditor complaining as to present obstruction or anticipated hinderance, by mismanagement, misappropriation of corporate property, or otherwise, to the collection of corporate obligations.

It is the suit of stockholders against the corporation. Stockholders alleging the high equity, it is true, of fully paid stock, and asserting rights as against unpaid stock, but still asserting a distinct and independent equity to that of creditors or third parties who have dealt with the corpora-

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tion from without, and disconnected with it and its share-holders. And this must be borne in mind in considering such suggestions as are to be further made respecting the receivership, and the competency of the Court to make it, in the attitude of the parties and condition of the record.

In addition to facts heretofore set out as shown in the bill (speaking, of course, in reference to original Downing bill, to which Sheridan and Rhoades had become parties complainant, and whose allegations they repeat in supplemental bill, as well as to showing in addition of the supplemental bill), the complainants allege that the corporation is in the control and management of its assessable stockholders, who compose and control its directory and offices. It sets forth gross misconduct and mismanagement, infidelity to official trusts, conspiracy to permit corporate property brought to sale for their personal benefit; suits brought and judgment confessed or permitted without resistance by them, including the attorney of the corporation; surrender up of lands, and compromise of claims of vendors and stockholders, to the prejudice of the corporation; refusal to have stockholders' meeting, and refusal, on demand of complainants, to call meeting and assess share-holders to settle liabilities, including alleged unpaid taxes on the corporate property.

It was further averred that several suits had been instituted, and defendant was intending to permit property to be sold and sacrificed; and that

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arrangements had been perfected whereby its property was to be transferred.

Injunction was sought and allowed against the sale of the corporate property or any disposition of it, either by the suing creditors or the defendant corporation.

The case made in the bill, admitted in answer, or upon denial, being proven, manifestly calls for the interference of the Court in the appointment of a receiver, and discretionary action as to winding up the affairs of the corporation, the end sought by the bill. Conceding so much, we look into the condition when the appointment of a receiver is made, in connection with certain adjudications of the Court, to determine on this application for a supersedeas whether the Court could properly have made such appointment and adjudications as are to be noticed, in advance of final hearing. The case made in the bill was not, however, admitted in the answer, and there has been no evidence taken.

The defendant not only denied complainants' rights as paid-up stockholders, averring that their payment was in options and contracts which, in respect to iron ore lands, were valueless, and that they were put upon the company by false and fraudulent representations, but showed that, in another suit brought by complainants against defendant, it had a cross-bill pending to have it so declared, and complainants' rights, as stockholders,

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adjudged invalid, and it set up same defense in this suit in answer.

It denied that its officials or directors had been requested to collect subscriptions; shows that the policy of delay and adjustment of claims of vendors by reconveyance, etc., was done with the full assent and agreement and active participation of complainants; shows that iron ore interests were valueless, and town site property greatly overestimated; that defendant was settling these claims, compromising and conveying some lands, and stockholders' interests would have to be re-adjusted in consequence; that complainants were in accord with them in this policy, and had expressed a willingness to reduce their stock on some fair and equitable basis; that this induced the policy pursued, and that failure to make calls on stockholders had thus resulted, and was consented to and largely brought about by the action, conduct, and advice of complainants.

It explains suits brought, and denies misconduct alleged; shows it was pursuing policy which was best for all, and which was necessitated by conditions and consented to by complainants, and that now to permit complainants to change that policy, and force collections of stock and acceptance of all property and sale of all instead of the settlement and compromise policy agreed upon and pursued, would work great wrong and injury to the corporation.

It admitted the assets and debts to be about

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as charged, but showed that nothing like so much land and iron interest was bought as complainants aver, but says the amount actually bought fell very much short of the amount purported to be transferred in options and other contracts to the corporation by the complainants.

These were the issues made.

The question is as to the right of the minority to take the management out of the hands of the majority, to change a policy (set up in the answer as an agreed one) from compromise and reconveyance of worthless lands in settlement of corporate obligations therefor, to adjust between themselves resulting equities by surrender of stock, and so reduce interests and collections, to one of forced collection of all stock and no adjustment; payment of all obligations and no surrender of lands or compromise; recognition of complainants' stock in full and no adjustment as to that; affairs wound up now on the latter basis, and business ended, or upon that assumed by the majority, carried on by the company as a going and solvent corporation.

These were issues between minority and majority stockholders. If a receiver was appointed, the majority lost control of the property and the policy of the company. If stock was collected, it was against alleged understanding between the parties as to re-adjustment. It hindered, if it did not absolutely prevent, all efforts to arrange with vendors. It put the company to the necessity of reversing its policy as agreed upon by all, and made

it yield to a minority, claimed to have assented to the acts complained of.

This being the effect, it is manifest that the appointment of a receiver, in itself, in view of these peculiar issues and at the instance of these complainants, means and adjudicates more than the designation of a person to take charge of and hold property pending litigation.

In the attitude of the parties, and in view of the issues between them, much of the lawsuit was settled by appointment of a receiver. It was practically settled that complainants' subscription and payment for stock was valid (though in issue), and they were entitled to call the corporation to settlement. It was settled that re-adjustment between themselves was not to be permitted, or not, at least, until defendant should collect all its stock.

But, added to the fact of appointment, the Chancellor adjudicates that the stock is due, and directs its collection. This (it must not be forgotten), not at the instance of creditors, but between stockholders themselves, fighting each other upon an issue that there was to be a reduction and re-adjustment, made in advance of the settlement of that issue, and of the taking of any evidence upon it, made on motion heard on affidavits.

There is no question that the decree would have been a proper one on a hearing upon the merits, had the issues been found in favor of complainants; but it was not competent for the Chancellor to make it in advance on motion. The

complainants were already protected by injunction. Defendant was restrained from selling its property, and creditors were restrained from doing so. The question left then at issue was as to collection and payment of debts, or compromise and re-adjustment alleged to have been agreed upon. The Chancellor decides that issue by deciding the stock is now due, and ordering collection.

There (as between themselves) could have been no objection to agreement upon the policy defendant insists was agreed upon. Creditors could, of course, complain, and might prevent, but they are not complaining, and it cannot be defeated by adjudication against it in advance, and collection forced.

The legal question as to the right to supersede such an order as the one made is the only question really existing. This we have attempted to settle in the form of stating results of our consideration.

There is of course no controversy among counsel, such as present this case, as to what the law is. The question of controversy is only as to the application of recognized law to particular facts.

That under the Code this Court has no power to supersede an order granting or dissolving an injunction (7 Cold., 217; 1 Heis., 769; 1 Lea, 80); nor to supersede an order refusing to quash an attachment (9 Bax., 561); nor to supersede an order in a proper case for appointment of a receiver, merely to take hold and dispose of prop-

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erty for benefit of parties in litigation pending the suit; nor to supersede an order already executed (2 Leg. Rep., 287; 3 Lea, 50; 1 Lea, 394, 531; 11 Lea, 228) is not debated or debatable. But it is equally settled that where upon the issues a receiver could not have been appointed at all, or until the issues were settled which justified it, or other adjudications were made which affirmatively settled rights, and which orders were being, or about to be, executed, to the prejudice of parties still litigating these issues, then the order appointing a receiver may be superseded, and such adjudications in connection therewith as are beyond the competency of the Court to make in advance of a trial. 3 Bax., 204-391; 12 Heis., 506; 8 Bax., 534; 1 Leg. Rep., 363; 2 Lea, 154.

The question is as to the effect of the decree at the stage made, and in the condition of the record. It is not whether the order was erroneous, but whether one to be enforced actively, and which may deprive the party complaining of rights, of money or property in advance of the final hearing. All this Court can do on application for, or on motion to discharge supersedeas, is to see that the order complained of was of this character. 8 Lea, 465.

The power is limited to such an order or decree as determines rights of the parties about which they are litigating, in advance of a hearing, and which is susceptible of being executed by some affirmative action or process.

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Take this case: If it be the right of this corporation, under agreement of its contending stockholders, which was being carried out by its directory, to proceed to compromise with vendors and re-adjust with share-holders upon diminished value and then collect, it cannot be deprived of that right in this litigation by a decree suspending or abrogating that policy and forcing collection now.

If it be a right of the company to deny complainants' power to force it to collect, because complainants are not good faith holders of its stock, it cannot be deprived of that right, and forced to collect first and try afterward.

It has been earnestly pressed upon us that the case of *Baird v. The Turnpike Co.*, 1 Lea, 394, is authority denying the right of this Court to supersede such an interlocutory order as here presented, upon the ground that the facts were similar. That was a petition of stockholders (alleged) against the president, directors, and officers of the company, and (of course) making the company a defendant, to have complainants' rights declared, and call defendant to account for income and profits of road. It does not appear that complainants were not the holders of practically all, or, at least, a majority of the stock. It does not appear that any defendant raised an issue as to their right as stockholders or to call defendants to account. It does not appear that the action of the corporation was involved at all. It was a contest, as stated,

of stockholders with their mismanaging officers; and still less does it appear that it was an issue in that case that the action taken by defendants was in pursuance of a settled policy, assented to by complainants, and pursued by agreement.

The adjudication in that case was the ordinary and proper one appointing a receiver and turning over property at the instance, so far as we can see, of its practical owners. The effort was to supersede it after it was executed. Here the effort is by a minority, through the Courts, to take without a hearing, control of a solvent corporation out of the hands of the majority, revoke alleged agreements in advance of a trial, whether made or not, reverse a deliberate policy asserted by defendant to have been adopted by assent of complainants, without giving defendant a chance to prove it; and all upon the theory that, because it is within the competency of the Court to appoint a receiver in advance upon issues made or tendered requiring it, and, when so made, such order cannot be superseded, therefore, there can be no supersedeas in any case where minority stockholders have obtained such an appointment in a suit against the majority, no matter what the issues may be, and what may result from the adjudications in connection with his appointment.

Such a ruling would be very unfortunate in this day of multiplying corporations. It would practically turn them all over to minorities, and, as a result, wind them all up in receiverships. The

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majority of a solvent corporation must be allowed to control it until it be alleged and admitted or proven that it is so rashly or fraudulently or improvidently managing its affairs as to injure unfairly the minority. Then it may be deposed, and the Courts assume control. But, in this character of case, it needs a proper showing in the bill, sustained by proof, to force such a result; for, after all, the result thus obtained is the merit of the controversy, and needs to be decided only at its end.

Defendant is entitled to the supersedeas prayed for, and I direct its issuance upon execution of bond in the penalty of \$10,000, conditioned to pay complainants such sum as the Court may decree on final hearing, and pay all such cost and damages as complainants may sustain.

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STATE, *ex rel.*, v. MORRISTOWN.

(Knoxville. October 6, 1893.)

1. MUNICIPAL CORPORATIONS. *Subscriptions to railroads.*

A subscription by a municipal corporation to the capital stock of a proposed railroad cannot be sustained under Acts 1887, Ch. 3, unless the application therefor purports in terms upon its face to have been made under that statute. This requirement of that statute is mandatory. (*Post*, pp. 241-248.)

Acts construed: Acts 1887, Ch. 3.

2. SAME. *Same.*

A subscription by a municipal corporation to the capital stock of a proposed railroad cannot be sustained, under our statutes, when the application therefor describes two lines beginning at the same point, one with fixed terminus at the other end, and its line located by survey and cost of its construction estimated, as required by the statutes, and the other left wholly indefinite, but suggesting a different line and terminus, without estimate of cost of construction, and the road is actually built upon a line and to a terminus other than that defined in the proposition. (*Post*, pp. 248-250.)

Code construed: §§ 491a, 1142-1165 (T. & S.); §§ 1278-1297 (M. & V.).

Cases cited and approved: *Pulaski v. Gilman*, MS., Nashville, 1880; *Winston v. Railroad*, 1 Bax., 60.

3. SAME. *Same. Estoppel.*

A municipal corporation cannot be estopped to deny its liability upon a subscription to the capital stock of a proposed railroad, made without a lawful vote authorizing it, by the failure of its Board of Mayor and Aldermen to object to the construction of the road over a route and to a terminus other than that defined in the proposition upon which the subscription was made. (*Post*, pp. 250-252.)

Case cited and approved: *Milan v. Railroad*, 11 Lea, 329.

FROM HAMBLEN.

Appeal in error from Circuit Court of Hamblen County. W. R. HICKS, J.

State, *ex rel.*, v. Morristown.

JAMES G. ROSE, HELM & BRUCE, and TEMPLETON
& CATES for Relators.

HOLLOWAY & ESSARY, W. S. DICKSON, and JAS.
T. & J. K. SHIELDS for Morristown.

SNODGRASS, J. The relator is a corporation of this State chartered to build and operate a railroad from Morristown, in Hamblen County, to a connection with the Knoxville, Cumberland Gap and Louisville Railroad, in Grainger County, Tennessee.

As such, on March 18, 1890, it submitted to the Mayor and Aldermen of Morristown an application for subscription to the stock of said company, upon the proposition to build a railroad from said town to a terminus or termini therein set forth. The application and proposition were as follows:

“MORRISTOWN, TENN., March 18, 1890.

“*To the Mayor and Aldermen of the town of Morristown, Tenn.:*

“We, the undersigned, desire to submit to your honorable body the following proposition: We will construct a standard gauge railroad from a point within the corporate limits of Morristown, in a north of west direction, to a point at or near Bean Station, and thence to a junction with the Knoxville, Cumberland Gap and Louisville Railroad at or near Cedar Ford, or to such a point on the said railroad north of Clinch Mountain as our engineers may select, covering the best route and most advantageous connection with Cumberland Gap. Work of grading to commence at Morris-

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town within sixty days from affirmative election in Morristown, upon condition that the town of Morristown subscribe \$50,000 to the stock of this company, to be paid for in cash or six per cent. twenty or thirty year town bonds as hereinafter named, and provided further that the county of Hamblen subscribe the further sum of \$25,000 to the stock of our company, and the county of Grainger subscribe the sum of \$75,000 to the said stock, both of said sums to be paid in cash or in six per cent. twenty or thirty year county bonds. The payment of the cash, or the delivery of said bonds, to be made to us upon the completion of the construction of the said road, viz.: When the last rail is laid connecting Morristown with the Knoxville, Cumberland Gap and Louisville Railroad. We shall ask a limit of time for the completion of this road not to exceed two years, the time to begin to run from sixty days from the day of the election to be held on the question of subscribing to said stock in the town of Morristown.

“As a first step toward getting these subscriptions, we respectfully ask that your honorable body submit the question of subscription to the qualified voters of Morristown. Very respectfully,

“THE MORRISTOWN AND CUMBERLAND GAP R. R. Co.

“Per J. G. MARTIN,

“JOHN P. ARTHUR,

“F. H. ALLISON,

“W. E. SCARRITT,

“W. TALBOT PENNIMAN,

“*Incorporators and Board of Directors.*”

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It was accompanied by profiles and a sworn estimate of the grading, embankment, and masonry therewith according, by the engineer of the company.

The proposition was accepted by the Board, an election ordered and held, and the requisite majority duly voted "for subscription." The result was certified, and, in pursuance thereof, the Mayor was, by ordinance of the Board, duly authorized and instructed to subscribe for fifty thousand dollars of the stock of the railroad company, which he accordingly did.

The company began, and completed the road to a point near Cedar Ford, one of the terminal points indicated in the proposition, but not a point in Grainger County, and not the terminus according to profile and estimate submitted. Nor was the road built, beyond Bean Station, along or near the line indicated in the profile, and for which the survey and estimate had been made and filed. In other words, the proposition, unless profiles and estimate are to control, provided for two distinct, different, and remote lines, with terminal points at different and remote places on the road with which connection was to be made, and in different counties, one (that indicated in the profile and estimate) being in a north or north-western direction from Morristown, twenty-five miles in length, the most immediate and advantageous route to connect with Cumberland Gap at a point in Grainger County, and the other a line in a south-western

direction, forty miles in length, extending several miles beyond the western boundary of Grainger, and terminating in Knox County, at a more remote point, of course, and making a far less advantageous connection with Cumberland Gap, the point of junction, in fact, being farther from Cumberland Gap, by several miles, than is Morristown, the other terminus of the constructed route.

If the profiles and estimates filed do not control, there was, therefore, two propositions embraced in the application—one for a road from Morristown to Cedar Ford, without profile, map, or estimate submitted, and one from Morristown to a point north of Clinch Mountain to a junction with the Knoxville, Cumberland Gap and Louisville Railroad, over a defined line twenty-five miles long, whose grading, embankment, and masonry were estimated. If profiles and estimate control, there was but one proposition, and the Cedar Ford terminus not important, being a superfluous addition thereto.

So much has been stated here, in advance of statement of the controversy and issues in this case, for convenience in application when these shall have been stated. The action is mandamus to compel defendant to pay cash for stock subscribed or issue twenty year six per cent. bonds therefor. The corporation defends upon the ground that the subscription was illegal, the application and submission to vote not being such as was legally authorized, and subscription by the Mayor therefore void.

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Much contention has arisen whether this application was made, election held, and subscription voted under the Act of 1887 or under the Code provisions, §§ 1142–1165, inclusive. M. & V., §§ 1278–1297. (It is proper to observe here that the sections cited from the M. & V. compilation are not literal reproductions of the original Code sections cited, but purport to give them as amended up to and inclusive of the Act of 1881.)

The question in the abstract is very important, for though some provisions of both (Code and Act of 1887) are substantially similar, there is a difference in the powers conferred, the obligations imposed, and the rights secured under the two statutes. There is no power vested in municipal corporations under the Code provisions to issue bonds, and it has been expressly held that no such power is given or to be implied from Act of 1871 (now incorporated in M. & V. compilation as part of § 1282), Code (T. & S.), § 491a, to which the Act of 1881 (a further amendment, incorporated in same section of M. & V. compilation) has, we hold, added nothing (*Mayor and Aldermen of Pulaski v. Gilman et al.*, MSS., Nashville, 1880), while under the Act of 1887 express power is given to issue bonds running not more than twenty years, or pay subscription in cash. Under the Code provisions, not more than thirty-three and one third per cent. of subscription can be collected in any one year, while under the Act of 1887 no tax ex-

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ceeding twenty-five per cent. of the subscription can be levied in any one year.

Among most important differences as to rights of parties, the Code provides that the collector shall give to each tax-payer a certificate of tax paid by him. This is made negotiable by delivery or assignment, and is receivable for freight and passage on the road one year after its completion, and convertible into stock of the railroad company on demand, at option of holder of such certificates, to the amount of one or more shares. As a consequence of these rights thus secured to tax-payers, the obligation to so receive these certificates for freight, passage, and stock is imposed upon the railroad company.

No such provisions are made in the Act of 1887. To say nothing, therefore, of any minor differences in the two acts as to method and forms of application, etc., the most material difference exists in the powers conferred, obligations imposed, and rights secured under the two statutes. To guard against any confusion, to prevent any misconstruction or controversy as to these powers, rights, and obligations vested, acquired, and imposed under propositions for county or municipal subscriptions, the Legislature expressly provided in the latter statute, that it was not intended to prevent subscription under the former, but was an additional method or plan under which they could be made (§ 16); and further expressly provided that, "before any county shall make any subscription under the

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provisions of this Act, the president or other authorized agent of the railroad company shall submit an application," etc., "setting forth that the application is made under this Act," and that "before any incorporated city or town shall make any subscription under the provisions of this Act, *such application* must be submitted," etc. Manifestly including by reference to *such application*, the "setting forth," that it is made "under this Act." § 3.

The language is itself mandatory, but, taken in connection with its obvious purpose, admits of no other construction than that it was intended to be mandatory, and we so hold.

Nothing could better illustrate the correctness of that view than the present case. Some substantial conformity to both Acts (as was expected by the Legislature might result), gives room for the ablest and most ingenious arguments to show that it might be held to have been made under either or both. This question was not intended to be left to intendment, to confusion, inference, or strained construction. Both statutes are plain in their provisions, and are intended for observance in mandatory particulars; and, if application is made under the latter for the special advantages it gives over the former, it must be so set forth in the application. But both upon its face and according to the actual facts proved as to intent, if such could be looked to, it was made not under the Act of 1887, but under the Code provisions. The application was not by the president

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or an authorized agent or officer to a Mayor or chief executive officer, but was by directors to the Board of Mayor and Aldermen. It was accompanied not by a "map," as required by Act of 1887, but by the sworn estimates of an engineer of a surveyed route, as required by the Code.

Of course, we are not meaning that directors are not in a proper sense officers, or that the Code application under Act of 1887 might not be made by them, but it is clear that it might be so made under Code, while the Act of 1887 seems to contemplate proposition from an officer or agent constituted as president; and, doubtless, if that Act had been in view in making this application, a further organization and election of president, manager, or other authorized agent of like character would have appeared, and such application been submitted by him to the Mayor, instead of by the body of directors, without an official head or managing officer, to another body of men, the Board of Mayor and Aldermen, as was done, and as was manifestly authorized by the Code. But it is useless to discuss these minor questions, to show by argument that it was not made under Act of 1887. The fact that construction could possibly make the provisions of the application answer the requirements of both statutes, only more strongly sustains the construction that application should "set forth" in express terms, that it was made under the latter law, if it was thus intended, so that rights should be settled under the one or

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the other after the subscription was made. If both statutes were precisely the same as to form and terms of application, the fact that different powers are vested, different obligations are imposed, and different rights secured by the latter, would make it essential that it be shown in the application under which law it was made (both being in full force), and clearly shows that such requirement by the Legislature, that it be set forth, was not a matter of form, but of most vital import. It was necessary, in fact, to show, and was made imperatively so by the express terms of the last Act, whether the application was made under it (and if not, it was, of course, under the other), so that when the proposition submitted might be accepted, powers would vest which this Act confers, and rights that it gives be secured. Otherwise, it could not be claimed by either party to the contract that the different provisions of the latter law were to govern as to these powers and rights.

The application then being under the Code, the question is, Was the subscription valid, and can it be enforced? That statute does not admit of but one construction. The termini of one route must be given, not alternately of two. Of course an absolute point of termination may not be essential, but the substantial termini of *one line* so definite that it must have been surveyed and substantially located, and the termini designated and line so defined as to approximate its general direction accurately enough for an estimate of the grading,

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embankment, and masonry to be made by a competent engineer and sworn to. Code, § 1145 (M. & V., § 1282). This section is imperative, and not merely directory. *Winston v. T. & P. R. R. Co.*, 1 Bax., 60.

If the law could be evaded by submitting along with such location and estimate, an alternative proposition for a different route, without either survey, definite location, or estimate, it is obvious that it would be a matter of no consequence whether it was the one or the other, for just as in this case a survey, location, and estimate of one line between two points would be filed with suggestion of another not so located, surveyed, or estimated, and when the subscription was voted the latter might be adopted. The law would, therefore, serve no purpose except as a cloak to conceal the real intent of construction.

We think it plain that such a proposition could not be submitted, or, if submitted in such form, could bind the corporation voting for subscription, only if the surveyed and estimated route was in fact adopted and constructed, in which event the alternative proposition might be treated as surplusage, and if line was in fact built as located, the municipality might be estopped to say that along with a valid proposition had been submitted an alternative invalid one. Just as if it had voted for a proposition to pay cash or issue bonds, and was not vested with power to issue bonds, yet, if the subscription was otherwise valid and work

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performed in strict accord with it, it might be required to pay cash as agreed and estopped to deny its liability to do this because of the fact that it could not do the other.

In this case the road was not constructed upon the line surveyed, estimated, and designated. It follows, therefore, that the defendant cannot be compelled to pay its subscription or to issue bonds therefor. Had the application been under the Act of 1887 a like result would follow under the reasoning on the alternative proposition. Neither statute contemplates such a thing, but both require substantial designation of a single line with two—not three—termini.

It is argued, however, that whether the subscription was valid or invalid, the road was built for Morristown, where it now lies; that it was a long time under construction, and that the Board of Mayor and Aldermen, and the people of the corporation knew that it was being so constructed, and that large sums of money were being expended on the faith of the subscription, and the corporation is now estopped to deny its liability.

To this there are several answers. The road was not built for Morristown, but for the company. Morristown was but one of the subscribers to its stock, and stands in the relation merely of a stockholder resisting collection of subscription upon the ground of its invalidity, and whether it might be estopped from insisting, as it does among other things, that the company was chartered to

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construct a road from Morristown, in Hamblen County, to a point in Grainger County, and had violated its charter right and duty by construction of another and different road to another and different point, and subjected itself to forfeiture by the State, and, therefore, could not compel a subscriber to its stock to pay, it is not material to inquire, for its next answer is conclusive, and that is, that, under the law, no contract can be made by the Board of Mayor and Aldermen, except upon election by the voters of the municipality. What three-fourths of these vote for, becomes the contract or gives it its validity. The Mayor and Aldermen can make no other or different contract by act or omission. They could not make it in the first instance, nor can they vary it, if they expressly undertake to do so, still less by acquiescence in an improper execution of it. In the making and the execution and the enforcement of such contracts with counties or municipalities, parties must stand upon strict law which it has been held is to be so construed and pursued. *Milan v. Railroad Company*, 11 Lea, 329.

If the law, strictly construed, authorized the contract, it can be enforced, otherwise not, as between the parties, and there is no question here except as between the company and its subscriber. No bonds having been issued, of course, no question of innocent holder is involved.

There are other questions in the case which have been ably argued, and well merit discussion,

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but, as it is not necessary to a decision that they be settled, we forbear to do so, and rest our judgment upon the most important and vital question in the case, upon the merits of the controversy.

The judgment of the Circuit Judge, refusing peremptory mandamus, is affirmed with cost.

Henegar v. Seymour.

HENEGAR v. SEYMOUR.

(Knoxville. October 31, 1893.)

1. BOUNDARY. *Between the Hiwassee and Ocoee Districts.*

The Court determines, upon the facts stated in the opinion, that there is not a strip or "gore" of vacant, unsectionized land between the Hiwassee and Ocoee Land Districts.

2. EVIDENCE. *Preponderance of.*

In ejectment for a strip of land claimed by the plaintiff to have been left unsurveyed and unsectionized, evidence in support of plaintiff's theory by a surveyor of only five years' experience, and none in the mountains of East Tennessee, who is shown to have made numerous mistakes in the survey, which is controverted by four experienced surveyors of many years' practice, does not warrant a judgment for plaintiff, where a part of the land has been in defendant's possession, under inclosure and in cultivation for over forty years, and other portions for more than seven years, and it was the evident purpose of the Legislature to sectionize all the lands in the district, and abutting land-owners recognized that no strip was left unsurveyed.

FROM POLK.

Appeal from Chancery Court of Polk County.

T. M. McCONNELL, Ch.

T. E. H. McCROSKEY for Henegar.

CHARLES SEYMOUR for Seymour.

WILKES, J. This is an action of ejectment to recover a tract of land alleged to be located in Monroe and Polk Counties.

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Complainants claim as the heirs of Francis W. Lea, who, in his life-time, July 7, 1858, obtained a grant for it from the State of Tennessee.

On the trial of the cause in the Court below, the Chancellor held that complainants had failed to sustain the allegations of their bill, and dismissed the same, and they have appealed and assigned as error the finding of the Chancellor against their contention.

The facts of the case, so far as they need to be stated, are as follows: Prior to 1819 the United States Government bought of the Cherokee Indians all their claim to the lands embraced in what was known as the Hiwassee Land District, having previously ceded the same to the State of Tennessee, subject to this Indian claim. After this purchase was made, the State of Tennessee appointed Commissioners to lay off the district into ranges, townships, sections, and fractions of sections. In June, 1819, some disagreement having arisen with the Indians in regard to the boundary line of the district, R. Houston and James McIntosh, on the part of the United States, and "Squire" and "Crow," on the part of the Cherokee tribe of Indians, were appointed Commissioners to resurvey and remark the line, which they proceeded to do, and on June 12, 1819, they agreed upon and signed their report at the forks of the Nautagulee and Cowee Rivers.

The Cherokees owned a section of country adjoining the Hiwassee purchase, lying south and

east of it, which became known as the Ocoee District. This was also purchased at a later date, and in 1836 the State of Tennessee directed a survey of this district into ranges, townships, sections, and fractions of sections.

The line between the two districts ran in a direction north 18° west from the beginning corner on the bank of the Hiwassee River, and the township lines were intended to close upon it, but could not do so, at right-angles, and the consequence was a great number of fractional sections and quarters were formed.

Maps and surveys were filed in each district showing the township, sections, and fractional divisions and lines, but the lengths of the fractional lines abutting on the boundary line were not given, but only the fractional areas.

On February 25, 1854, the State of Tennessee passed an Act authorizing the entry and grant of all unsurveyed lands in the Ocoee District, and in 1859 Francis W. Lea obtained a grant under this Act for 8,270 acres of land. Complainants claim as his heirs, and their contention is that there is a strip of unsurveyed land lying between the Hiwassee and Ocoee Districts on the Ocoee side of the Indian boundary line.

Defendants also hold under a chain of title from the State of Tennessee by numerous grants. Their contention is that there is no unsurveyed or vacant unsectionized lands between the two districts, but that the lines of the sections and fractional sec-

tions of surveyed lands in the two districts approach each other until they meet upon a common line, which is the original boundary line of 1819, and, second, that as to a large portion of the land embraced in complainants' grant, the grant is 'void, because the land was, at the time the grant was issued, in the actual adverse possession and occupation of defendants and their predecessors under older grants.

Complainants caused the lines called for by their grant to be run out by actual survey, using in making the survey not only the calls in complainants' grant, but also the calls of the fractional sections abutting on the district lines on both the Hiwassee and Ocoee sides, as obtained from their respective land-offices, and upon completing such survey the surveyor came to the conclusion that there was an area of 3,610 acres of land not covered by defendants' title, or any other, and not sectionized, but laying like a gore between the two districts, and it is this strip or gore which complainants claim, disclaiming all right to any land covered by the calls of defendants' title-papers, or lying in the sectionized portion of the Ocoee District, and disclaiming all right to any lands in the Hiwassee District.

It will thus be seen that the controversy narrows itself down to the question whether there is any vacant or unsectionized lands in the Ocoee District abutting on this Indian boundary line.

Defendants have also caused surveys to be made

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of the locality, and various tests to be applied, and the contention of each party is liberally illustrated by handsome maps covering all the territory and fully sustaining the opposite contentions, and in each case showing the utter impossibility of the correctness of the opposing theory from the stand-point taken. The accuracy and competency of the surveyors is called in question. It is said that the defendants' surveyors are not experts, that they did not locate the Indian boundary line, nor attempt to do so, and that their testimony and conclusion is based upon the laws fixing the boundaries of the two districts rather than upon any actual surveys and personal observations.

On the other hand, it is shown that complainants' surveyor is incompetent; that he has had an experience of only five years in Georgia, and none in the mountains of East Tennessee; that he guessed at his beginning corner, and in attempting to follow the Indian boundary line of 1819 he placed the variation of the compass needle on the wrong side of the meridian line; that he professed to find land-marks of the old line run in 1819 upon trees in a locality where it is shown the forest trees had been cleared away and the land cultivated for more than twenty years, and which had since been covered with a second or undergrowth for thirty years; that he also professed to find marked trees in other localities where it appeared the land had been cleared and in cultivation for forty years.

Upon an inspection of the title-papers of the contesting parties, and a comparison of their maps, and the statements of the surveyors explaining the same, we are of opinion that complainants have failed to show satisfactorily that there is any vacant or unsectionized lands in the Ocoee District, bordering on this Indian line between the two districts covered by their grant.

The testimony of Thomas, their surveyor, is wholly overthrown by that of Waring, Muller, Deakins, and McGuffey, the surveyors of defendants.

These latter gentlemen appear to be competent, intelligent, experienced surveyors and engineers of many years' standing and practice in their profession, with much experience in surveying mountain and other lands in the locality, and in locating old lines, including this Indian boundary line, which had been located by them in many places in the native forests, after reaching Starr's Mountain. Each of these surveyors states that from actual measurement and personal observations and experiments with various fractional and sectional lines, it is impossible that there should be a vacant gore or strip between the two districts. They explain that, while there is an apparent shortage in some of the fractional lines, and that others are too long, so as to cause at some places an interlap of the lines from the two districts, there is no discrepancy of any consequence at any place, and no more than would naturally, and does usu-

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ally, result in surveys over rough mountains, and especially in the early history and settlement of the country. That, while there is some confusion between lines and boundaries, caused by the hasty and careless manner in which early surveys were made, there is no such discrepancy as cannot be cured and explained by the rules observed in establishing calls for old lines and natural objects; that the greatest difference observed did not exceed forty poles in a line six miles in length, over very rough, mountainous grounds, while in other cases there were some lines that fell short small amounts.

It also appears that a part of the land covered by complainants' title-papers has been in defendants possession, under inclosure and in cultivation, for over forty years, and other portions for more than seven years, constituting what is known as the "Savannah farm," which lies partly in each district, crossing the Indian boundary line, and lying on both sides of the Hiwassee River.

The principal conflict seems to arise between a grant to Chas. Seymore for 4,000 acres, made in 1874, and the calls of complainants' grant. Seymore, soon after obtaining his grant, conveyed the land to defendants, and they have been holding the same adversely and in actual possession ever since, as to considerable portions of the area embraced.

In view of the evident purpose of the Legislature to sectionize all the lands in each of these districts up to the Indian boundary line, and the surveys and plats to carry this purpose into effect,

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as manifested in the surveys and plats in the land-offices of the two districts, and in view of the recognition by abutting land-owners that they hold up to a common dividing line, and that there is no hiatus or gore left unsurveyed and unsectionized, we would not be disposed to adjudge that there was an unoccupied and vacant strip of land along the Indian boundary line, which extends across the State, as the dividing line between the two districts, unless the evidence was very plain and convincing.

The Act of 1854, under which this grant was obtained, is, at most, only a legislative recognition that there may be lands left vacant in the Ocoee District, but not an adjudication that there are such vacant or unsectionized lands.

Upon a careful examination of the entire case, we are convinced that complainants have failed to sustain their contention that there is a vacant gore of land between the two districts, a portion of which is covered by their grant, and the judgment of the Court below is affirmed with costs, and the bill dismissed.

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Marshall v. Russell.

MARSHALL v. RUSSELL.

(Knoxville. October 31, 1893.)

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GIFT. *Sufficiency of delivery.*

Marshall went to Shown's office and handed him a note case containing a batch of notes aggregating about \$12,000, stating that he had given them to his wife, and that he desired Shown, who was an attorney, to collect or renew them in the name and for the benefit of the wife. Shown accepted the trust. After Marshall had left Shown's room, but before he had retired from the building, he returned and obtained one of the notes, for \$1,000, and immediately took and presented it to another person (Brumley), stating his reasons for making the gift.

Held: The Court cannot affirm that the delivery of the \$1,000 note to Shown was not inadvertent, and therefore the subsequent gift to Brumley is valid.

Cases cited and approved: *McEwen v. Troost*, 1 Sneed, 185; 2 Edw. Ch. (N. Y.), 92; 46 Maine, 48; 104 Pa. St., 593.

FROM GREENE.

Appeal from Chancery Court of Greene County.
Jno. P. SMITH, Ch.

HENRY H. INGERSOLL for Marshall.

A. B. WILSON for Shown.

DANA HARMON for Brumley.

Marshall v. Russell.

McALISTER, J. This is an appeal from the Chancery Court of Greene County, and the contest presented in the record is in respect to the ownership of a certain note. The note in controversy was executed by one T. D. Russell to Patrick Marshall, for the sum of \$1,040, for a loan of money, and was secured by a deed of trust on land. The title to this note is claimed by the defendant, Horace Brumley, and by A. N. Shown, the administrator of Patrick Marshall, and also by Bridget Marshall, the widow of the intestate. The original bill was filed by Bridget Marshall against A. N. Shown, administrator, T. D. Russell, and Horace Brumley, in which she alleged that her husband, the said Patrick Marshall, departed this life on July 22, 1890, and that A. N. Shown is his administrator; that on July 5, 1890, the said Patrick Marshall gave to complainant said note, and delivered the same, with others, to said Shown, for collection for her benefit, or renewal in her name, as he should deem best, and that said note is her property. Complainant further alleges that, after said gift was complete, the said Shown, to whom the note had been delivered for complainant, allowed said Patrick Marshall, at his request, to have possession of said note for a short time; that, while in said Patrick's possession, said note was lost or mislaid, or in some other manner passed out of his possession, and was not found until after his death, when it was discovered in the possession of defendant, Horace Brumley. The

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bill further alleges that the said Brumley now claims the note as his own, and denies complainant's right thereto. A. N. Shown, the administrator, answered the bill, admitting that the said Patrick Marshall, on July 5, 1890, delivered said note, with other notes, to respondent, for collection or renewal, but averred that, soon thereafter, he reclaimed the note in controversy, and the same was returned to him before renewal or the collection of any part thereof. Defendant avers that, if it was the intention of said Patrick Marshall to make a gift of this note to complainant, that said gift was not consummated, and the title to the same remained in said Patrick Marshall, and has passed to defendant as assets to be administered.

The administrator filed his answer as a cross-bill, in which he states that said note was then in the possession of Horace Brumley, who claimed the same as a gift from the intestate. He then charges that said Brumley was not related to Patrick Marshall, nor was said Marshall under any obligation, legal or moral, to make him such a benefaction. Respondent further averred that the said Patrick, at the time of the alleged gift to Brumley was old, feeble in body, impaired in intellect, and incapable of making a valid gift of his property.

The administrator denied, in the first place, that any such gift had been made to Brumley, and, in the second place, if such a gift had been made, it was invalid for want of mental capacity on the

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part of the intestate. The defendant, Horace Brumley, answered the bill and set up his title to the note. The answer states that on July 5, 1890, Patrick Marshall gave and delivered to Defendant Brumley the note in controversy on T. D. Russell for \$1,040. Defendant further states that said gift was made without solicitation on his part, and freely and voluntarily on the part of deceased. Defendant denies that the said Patrick Marshall was of unsound mind at the time said gift was made, but avers that his mind was clear, and that he fully understood and comprehended the transaction. The cause went to proof, and the Chancellor decreed that Horace Brumley had acquired a valid title to said note by gift from the said Patrick Marshall, and accordingly the original bill of Bridget Marshall, as well as the cross-bill of A. N. Shown, administrator, were both dismissed. From this decree the administrator and widow appealed, and have assigned errors. The first error assigned on behalf of the administrator is that at the time of the alleged gift Patrick Marshall did not have sufficient mental capacity to comprehend the transaction.

In the case of *A. N. Shown, Administrator, v. Bridget Marshall*, decided at the present term, the question was presented respecting the mental capacity of Patrick Marshall to make a gift of about \$12,000 in notes to his wife, the said Bridget, and the Court held the gift to be valid. The notes involved in that suit were given to the wife on

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the same day the note in controversy was presented to Horace Brumley, and the same proof upon which the Court adjudicated in favor of the mental capacity of the intestate is embodied in this record. The additional point, however, is made on this branch of the case, that even if it be conceded that Patrick had sufficient mental capacity to make a valid gift to his wife, yet the gift in this case was made to a stranger, who was in nowise related to him, and who had no natural claim upon his bounty, and that a higher degree of mental capacity is required to sustain a gift in the latter than in the former case. If this distinction be conceded to be sound, we find, upon an examination of the record, ample evidence of mental capacity to sustain such a gift, even to a stranger.

It is insisted on behalf of Bridget Marshall that the decree of the Chancellor is erroneous, for the reason that the evidence shows that said note was given to and received by her agent, A. N. Shown, and left in his possession for her, and that the gift was completed by actual delivery to said agent; that the gift was then irrevocable, and that Patrick Marshall had no right to withdraw the note from Shown and make another disposition of it.

The settled rule is that a parol gift of a chattel or chose in action, whether it be a gift *inter vivos* or *causa mortis*, does not pass the title to the donee without delivery and transfer of the posses-

sion. The effect of a valid delivery is to place the subject of the gift under the control and dominion of the donee, and his title and right of possession by such gift and delivery become absolute and irrevocable. *McEwen v. Troost*, 1 Sneed, 185.

It is therefore essential to the validity of such a gift that the transaction be fully completed—that nothing essential remains to be done. If left incomplete, there exists a *locus pœnitentiæ*, and what has been done may be revoked. An absolute gift, which will divest the donor's title, requires a complete renunciation on his part, and acquisition on the part of the donee, of all the title to and interest in the subject of the gift.

It is, however, settled that the delivery need not be directly to the donee, but may be made to a third party *for* the donee. If the delivery to the third party is simply for the purpose of delivery to the donee, as agent or messenger of the donor, the gift is not completed until the subject of the gift is actually delivered to the donee. In such a case, until the gift is so completed by delivery to the donee, the donor can revoke the agent's authority, and resume possession of the article. When the delivery to the third person is to him in the capacity of a trustee for the donee, and not as agent of the donor, such delivery completes the gift. To constitute such a case, the circumstances should show a full relinquishment of dominion over the property to the trustee for the

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purposes of the trust, so that the trustee shall not be the agent of the donor, but shall act for the donee instead. *Menchen v. Merrill*, 2 Edw. Ch., 333; *Neufville v. Thompson*, 3 Edw. Ch. (N. Y.), 92; *Dresser v. Dresser*, 46 Maine, 48; *Schott v. Lauman*, 104 Pa. St., 593.

The question, then, to be decided is, was the note in controversy delivered by Patrick Marshall to A. N. Shown as trustee for Mrs. Bridget Marshall, the donee, and was there, at the time, such a full renunciation of title and relinquishment of dominion over the property to the trustee for the purposes of the trust as completed the delivery, and constituted a valid gift *inter vivos*? A. N. Shown testified that about July 5, 1890, Patrick Marshall came to his office, and took from his pocket a cloth note-case, and handed it to witness, saying: "There are my notes. I have given them to my wife, and we want you to take them and collect them." I asked him if I should pay the sum collected on the notes to him or Bridget, and he said 'Pay them to Bridget; the notes are hers, and I want her to have what you get out of them.'" He said for witness to collect at once, and witness then asked him what he should do if the parties could not pay the notes, and he said: "Take new notes in Bridget's name." Witness again asked him if the notes were hers and if witness must account to her for them, and he replied in the affirmative. Witness then told him he would prepare a memorandum receipt of the

notes for Mrs. Marshall to sign, and take it to her. The said Patrick Marshall then started out of the office, but soon returned, and called for a note on T. D. Russell. Witness does not remember what he said he wanted with the note, but has an impression he said Russell was in town, he wanted to see him about the note. The Russell note was not returned to witness—heard afterwards he had given this note to Horace Brumley.

W. W. Weems, who was also present on the occasion in question, states that Patrick Marshall came into the office with a wallet in his hand, and told Mr. Shown he wanted him to take his notes and collect them, and pay the money over to Bridget; that if he could not collect them, to renew in Bridget's name. Patrick then started down the stairway, but, before he got down, he came back, and told Mr. Shown he wanted a note from the wallet on Thomas Russell for \$1,000. The note was handed him, and he left the room.

It appears that about \$12,000 in notes were given to Bridget Marshall, and all were decreed to her in the case of *A. N. Shown, Administrator, v. Bridget Marshall*, decided at the present term. Horace Brumley, as already seen, claims the Russell note, which is the subject-matter of the present suit. We are of opinion, upon the facts stated in this record, that while Shown was constituted trustee for the renewal and collection of these notes for the benefit of Bridget Marshall, yet there was not such a renunciation of the title of the

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Russell note, and relinquishment of dominion over it, as to amount to a completed delivery of it to the trustee. This note was not specifically mentioned in the general transfer of the batch of notes to Shown, and the fact that Patrick Marshall, before he had retired from the building, came back to Shown's office and demanded the Russell note, which he carried away, would seem to indicate that he delivered it to Shown through inadvertence, and that he never intended to include that note in the lot of notes given to his wife. It appears that on the same day he went to the store where Horace Brumley was employed and presented him this note. He asked Brumley to read the note, and stated to him that it was secured by deed of trust executed by T. D. Russell and wife. Patrick Marshall also stated to Brumley, at the same time, that he gave it to him because he was just married and needed it. He also stated to Brumley that he had always been kind to him, and he would rather Horace should have the note than any one. Patrick frequently spoke to others of the many acts of kindness extended him by Brumley, and often said that Horace would not lose any thing by such treatment. It further appears that after presenting the note to Brumley, Patrick mentioned the fact to others, and spoke of the reasons that controlled him in making the gift.

We are of opinion the gift is valid, and the decree of the Chancellor is affirmed.

Headrick v. Fritts.

HEADRICK v. FRITTS.

(Knoxville. October 31, 1893.)

1. ADVERSE POSSESSION. *Continuity of not broken, when.*

The continuity of adverse possession of land is not broken by the possessor's offer to purchase a hostile claim for the purpose of quieting his own title. (*Post*, pp. 271-274.)

2. OUTSTANDING TITLE. *Effect of pleading.*

Pleading an outstanding title as a defense in ejectment does not estop the pleader to dispute its validity or to set up his adverse holding against that title in a subsequent suit brought to enforce it against him. (*Post*, pp. 274, 275.)

3. ESTOPPEL. *Between attorney and client.*

An attorney having furnished abstract of title, upon faith of which another has purchased and paid for land, cannot defeat such purchaser's title by subsequently becoming the purchaser, at a nominal price, of an outstanding superior title, of which he had knowledge at the time, but did not mention in the abstract nor inform the purchaser until the purchase-price was fully paid. (*Post*, p. 275.)

FROM HAMILTON.

Appeal in error from Circuit Court of Hamilton County. Jno. A. Moon, J.

E. M. DODSON and PRITCHARD, SIZER & THOMAS for Headrick.

J. A. CALDWELL for Fritts.

WILKES, J. This is an action of ejectment, to recover five thousand acres of land lying in Hamilton County.

Defendant entered a disclaimer as to all but one tract of twenty-nine and eight-tenths acres, and an undivided one-third interest in another tract of thirty-seven and one-half acres.

As to these tracts, he pleads not guilty, setting out in his plea the boundaries of the two small tracts. The cause was tried, without the intervention of a jury, in the Court below, where the Circuit Judge was of opinion that plaintiff had not made out his case, and dismissed his suit, and he has appealed and assigned errors.

The plaintiff claims under an older grant, but defendant holds under a chain of title with adverse possession for more than seven years.

It is assigned as error that defendant has not, by proof, established the fact of possession of any part of the land in controversy, being an interlap between the two grants.

This assignment is not well made. We are of opinion, from the facts in the record, that defendant, and those under whom he claims, have been in possession of the disputed territory since 1883, and that some parts of it have all the while been under actual inclosure, both by defendant and Sims, his predecessor in title.

It remains to be considered whether this possession has been adverse and continuous during this time. It is insisted that the continuity of adverse possession, if it ever began, was broken by an offer upon the part of Sims, from whom defendant claims title, to purchase the lands from the plaintiff.

It may safely be assumed as a general proposition that, if a defendant in possession of disputed territory concede that the true title is in another, and offer to purchase from him, then the continuity of adverse possession is broken. But there is a broad difference between the cases where the real title is conceded and acknowledged to be in another, and an offer or contract is made to buy the title from him as the true owner, and the cases where there is a new offer to buy in an outstanding claim for the purpose of quieting a title already held, in order to prevent litigation.

The defendant in possession has the right to buy in an outstanding hostile claim in order to quiet his own title and possession under a different title, and he may make such purchase or offer to purchase of the real owner without prejudice to his own adverse holding, provided he buys in such hostile title in order to quiet his own, and not merely as a recognition of the superiority of the adverse title, and his desire to hold under it.

Each case will depend upon its own facts and circumstances, and the intention of the parties as to whether the fact of purchase is intended as an acknowledgment of the true title or a mere effort to extinguish an adverse claim; and the solution does not depend merely upon the question whether the party from whom the purchase is made or attempted is or is not the true owner.

Every claimant is presumed to have some title, and the defendant is not required, at his peril, to

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determine that he is buying from the true owner, but he may buy any adverse claim, whether well or ill founded, in order to protect his own title.

In this case, the circumstances of the parties are peculiar. Sims, the vendor of defendant, bought and went into possession in 1883. Defendant bought from Sims in 1888, and went into possession under Sims' title. While Sims was the owner and in possession, between the date of his purchase and of his sale to defendant, he agreed to buy in plaintiffs' claim to the land under the older title, called the "Stephenson grant." For this he was not to pay any money, but was to assist in perfecting titles to other parcels of land in the plaintiff. Fritts, his vendee, knew nothing of this arrangement when he bought, and was not aware of any defect in his title through Sims, nor of any claim on the part of plaintiff.

Plaintiff had derived his title immediately from one Stanly, who is a joint plaintiff in this action. Stanly's title was derived from and under a chancery proceeding instituted to wind up an abandoned corporation. He took title in November, 1886, under a deed from a Clerk and Master, and immediately quitclaimed all his rights to the plaintiff by a mere indorsement on the deed to him from the Clerk and Master.

At this time the land in dispute was being held by Sims, under the younger or Minnis title, and he was in actual possession, and this possession

was known to plaintiff when he took title to the land from Stanly.

The entire proceeding, under which this title was obtained by plaintiff, was indicative of the fact that the land was worthless, or that the title to it was defective and disputed, the price paid being only \$5 for the entire 5,000 acres thus bought by quitclaim indorsement.

Plaintiff having thus become the owner of the older or Stephenson title, Sims, the vendor of defendant, entered into a contract, as before stated, to buy in his claim. He never consummated the purchase, and the transaction was not pressed by either party, but was suffered to remain dormant for about six years.

Under these circumstances, we think this was not an effort to buy a title recognized to be perfect, but it was simply to quiet a title Sims already held by extinguishing a hostile claim; and the fact that the negotiations were allowed to slumber so long strongly indicates that neither party considered the matter of perfecting his title as a matter of any great importance.

In the meantime, Defendant Fritts had bought and paid for the property, and had made valuable improvements upon it, in ignorance of any defect in his title.

It is said, however, that defendant is now estopped to deny the Stephenson title, or to set up any adverse holding against it, inasmuch as in the Ellis suit for the same land defendant, as well

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as his vendor, Sims, had admitted under oath that they were holding under the older Stephenson grant. We do not attach great importance to this admission. It is true that defendant and his vendors did, in sworn answers in the Ellis suit, admit and contend that they were holding under the Stephenson as well as the Minnis title, but it also appears that these answers were prepared by plaintiff, as the attorney at that time of defendants, and they made the answers under plaintiff's advice as their attorney that they had a right to rely upon an outstanding title, and the defense, as thus made by them, was under the advice and suggestion of plaintiff as their attorney and counsel.

It further appears that in November, 1886, a short time before plaintiff purchased in this Stephenson title, he made out an abstract of title to this land in controversy, and upon the strength of this title Defendant Fritts purchased the land.

In this abstract plaintiff made no mention of the title which he a few days afterward bought in, but did refer to the title under which Sims held, and to Sims' possession. Plaintiff did not at this time own the Stephenson title, but bought it shortly afterward, but never gave any notice to defendant of his adverse title until after he had paid for his land and made his improvements thereon, of all of which plaintiff had notice.

Under these circumstances, we think the Circuit Judge was correct in refusing relief to plaintiff, and his judgment is affirmed with costs.

Citty v. Manufacturing Co.

*CITY v. MANUFACTURING CO.

(Knoxville. October 31, 1893.)

STATUTE OF FRAUDS. *Must be specially pleaded.*

The statute of frauds must be specially pleaded whenever it is desired to rely upon it as a defense.

Cases cited: Brakefield v. Anderson, 87 Tenn., 206; Sneed v. Bradley, 4 Sneed, 304; Townsend v. Sharp, 2 Overton, 192; Patton v. McClure, M. & Y., 348; Newman v. Carroll, 3 Yer., 26; Pipkin v. James, 1 Hum., 325; Crippin v. Bearden, 5 Hum., 130; 86 Am. Dec., 682; 10 *Ib.*, 747; 68 *Ib.*, 191; 78 Ala., 243; 32 Ark., 97; 69 Ill., 639; 82 Mo., 193; 76 Maine, 227; 143 Mass., 386.

FROM HAMILTON.

Appeal in error from Circuit Court of Hamilton County. JNO. A. MOON, J.

J. A. CAMPBELL and JNO. R. BEASLEY for Citty.

ELDER & MILLIGAN for Manufacturing Co.

WILKES, J. The only question of importance in this cause is whether the statute of frauds can be relied upon under the general issue, or whether it must be specially pleaded by the defendant, in order that he may obtain the benefit of the same.

*Selected for report and annotation in L. R. A.—REPORTER.

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The decisions are uniform that the statute must be set up in the pleadings, and its benefits claimed in all cases where, in fact or in law, the defendant admits making the alleged contract, otherwise the defendant will be held to have waived the benefit of it.

In many of the States of the Union, and in England until the making of the late rules under the Judicature Act, it was held that a *denial of the agreement set up* places the burden of proving it upon the plaintiff, and he must sustain it by proper evidence, and the objection that parol evidence is insufficient may be interposed at any time. See the cases cited and collated in 8 Am. & Eng. Enc. Law, p. 747; *Hotchkiss v. Ladd*, 86 Am. Dec., 682; *Talbot v. Bowen*, 10 Am. Dec., 747; *Wynn v. Garland*, 68 Am. Dec., 191.

On the other hand, it is held in many of the States that a failure to plead the statute specially is held to be a waiver of its benefit, and a consent that the agreement may be proven by parol. It has been so held in Alabama, Arkansas, Illinois, Missouri, Maine, Massachusetts, and other States. See *Brigham v. Carlisle*, 78 Ala., 243; *Gwynn v. McCauly*, 32 Ark., 97; *Illinois Coal Co. v. Leddell*, 69 Ill., 639; *Gorden v. Madden*, 82 Mo., 193; *Farrell v. Tillson*, 76 Maine, 227; *Graffam v. Pierce*, 143 Mass., 386, and other cases.

We consider the question an open one under our decisions.

In the case of *Brakefield v. Anderson*, 3 Pickle,

206, the Court said: "Either party may repudiate the contract whenever he may choose to do so without incurring any liability for its breach; but, when one party seeks its enforcement through the Courts, the statute, to be made available, must be relied on as a defense."

This case, however, does not decide whether the statute may be relied on in the evidence or must be relied on in the pleadings.

In *Sneed v. Bradly*, 4 Sneed, 304, the Court said: "The doctrine is now well established that upon a bill for the specific execution of such a contract, if the contract be fully set forth in the bill, and the defendant admits it in his answer, and submits to waive the statute of frauds, or does not insist upon the statute as a defense, a specific performance of the contract will be decreed."

It is also held in *Jennings v. Bishop*, referred to in 3 Pickle, 206, that a parol contract may be specifically executed against either party if he fails or refuses to rely upon the statute.

None of these cases pass directly upon the point of practice now involved and under consideration. The case of *Townsend v. Sharp*, 2 Overton, 192, is relied upon as settling the question in this State. In that case the action was brought upon a breach of a lease for fourteen months, and, among other things, the general issue was pleaded. The declaration also alleged that the lessee was to pay, and had paid, a certain quantity of corn in

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part performance of his lease. Upon the trial, the plaintiff offered to prove the statements made in the declaration by parol, to which the defendant objected; but the Court overruled the objection, received the parol testimony, and instructed the jury that, if they believed the contract was made, *and in part executed*, by the parties, the case was not within the statute.

The only question passed upon by this Court, on appeal, was whether *part performance* would take the contract out of the statute. From an examination of other cases involving the statute we find that it has been the almost universal practice to plead it when it is to be relied on. See *Patton v. McClure*, M. & Y., 348; *Newman v. Carroll*, 3 Yer., 26, and other cases.

When the case of *Townsend v. Sharp*, 2 Overton, 192, was decided, it was the holding of our Courts that contracts not complying with the statute of frauds were void. See *Pipkin v. James*, 1 Hum., 325; *Crippin v. Bearden*, 5 Hum., 130, and other cases.

At the present time our holding is that such contracts are voidable merely, at the option of either party, and not void. See *Brakefield v. Anderson*, 3 Pickle, 606.

In view of this holding, we are of opinion the better practice is to require the statute of frauds to be specially pleaded whenever it is desired to rely upon it as a defense. To allow the defendant to proceed with his defense and speculate upon

his chances of a successful opposition until a large bill of cost has accumulated, and then, when he finds the chances against him, to permit him to interpose the statute, would be an unreasonable advantage to him at the expense of the plaintiff. If the contract is voidable under the statute, and the defendant intends to rely upon that fact and avoid it, it is but just that he should so notify the plaintiff, to the end that the litigation may end. If he does not rely upon the statute in his pleading, it is but just that the contract be enforced.

The mere denial of the execution of the contract is not equivalent to denying its validity and legality, since the contract may have been made, and still be invalid and voidable under the statute.

The judgment of the Court below is reversed, and appellee will pay the costs of the appeal, and the cause is remanded to the Court below for a new trial. The costs of the Court below will be adjudged by that Court.

*MCDONALD, SHEA & Co. v. RAILROAD.

(Knoxville. October 31, 1893.)

1. RAILROAD CONSTRUCTION. *Relation of railroad and construction company to latter's contractors:*

The railroad company and its construction company are jointly liable, upon the facts stated in the Court's opinion, to persons employed by the latter to furnish labor and materials for the construction of the road. (*Post*, pp. 283-288.)

Cases cited: 36 Fed. Rep., 815; 15 Am. & Eng. Ry. Cas., 100; 15 *Id.*, 210; 2 *Id.*, 77.

2. SAME. *Contractor's lien exists, when.*

And, in such case, persons furnishing labor and materials under contract with the construction company for the construction of the road, have a mechanic's lien thereon as contractors of the railroad company and the construction company jointly. (*Post*, pp. 283-288.)

Act construed: Acts 1883, Ch. 220.

3. SAME. *Same.*

A contractor with a railroad, who has negotiated notes received in part payment of his claim, is not first required to take up such notes before obtaining a judgment and lien for his services, but the judgment may provide for their payment out of the sum allowed. (*Post*, p. 289.)

4. SAME. *No lien for superintendent's salary.*

A superintendent of a railroad company is not entitled to a lien for his salary, although his services are rendered while the company is engaged in the construction of the railroad. (*Post*, pp. 290, 291.)

Act construed: Acts 1883, Ch. 220.

5. SAME. *No lien for money advanced to purchase right of way.*

One who loans money for the purpose of procuring the right of way for a railroad is not entitled to a lien upon the specific right of way, in the absence of any agreement to that effect. (*Post*, pp. 291, 292.)

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6. SAME. *Engineer's estimates conclusive, when.*

In an action by subcontractors to recover for services performed in the construction of a railroad, a decree based upon the final estimate of a chief engineer is proper where there was an agreement between the parties that upon all matters of difference such estimates should be conclusive. (*Post*, pp. 294, 295.)

7. JUDGMENT. *Confession of void, when.*

A confession of judgment by a railroad company to a construction company is void as against creditors of the railroad company, where the two companies are in reality but one, having the same officers and managers. (*Post*, pp. 289, 290.)

8. ATTORNEY'S LIEN. *Exists, when.*

An attorney from whom papers, which he has a right to hold against a railroad company for the payment of his fees and for money loaned by him, have been taken under orders and decrees of the Court, thereby swelling the funds for the payment of creditors of the railroad company, is entitled to be paid, out of the funds realized from the sale of the road, the debts for which such papers were held. (*Post*, pp. 291-294.)

Case cited: 3 Tenn. Ch., 621.

9. ATTACHMENT LIEN. *Does not attach to property in custodia legis, when.*

No lien is acquired under an attachment made after the Court has taken charge of the attached property, although its receiver has not taken actual manual caption thereof. (*Post*, pp. 290, 291.)

 FROM WASHINGTON.

Appeal from Chancery Court of Washington County. JNO. P. SMITH, Ch.

WEBB & McCLUNG, LUCKEY & SANFORD, and TURLEY & WRIGHT for Complainants.

McDonald, Shea & Co. v. Railroad.

CARR, REEVES & JENNINGS, REEVES & BAXTER,
KIRKPATRICK & WILLIAMS, and INGERSOLL & PEYTON
for Respondents.

WILKES, J. The complainants are railroad contractors, and constructed the Charleston, Cincinnati and Chicago Railroad across the State of Tennessee, and some portions of the line beyond the limits of the State. They made their contract for construction with the Massachusetts and Southern Construction Company. The latter is incorporated under the laws of Massachusetts, to construct railroads, and specially this line of road, and had a capital stock of \$250,000.

Complainants filed their bill to have a lien declared in their favor upon the line of railroad constructed by them in Tennessee, and to have the amount of their debt against the construction company declared, and its payment enforced by a sale of the railroad.

The railroad company entered into an informal contract with the construction company to build its line of railroad from Charleston, S. C., to the Ohio River, and agreed to pay it for such construction in its own bonds and stocks, at the rate originally of \$20,000 per mile of bonds and a like amount of stock, which, by a subsequent agreement, was increased to \$25,000 per mile of each, the contemplated cost of the road being \$20,000,000. The work in Tennessee was done by complainants, and they insist that, under the Acts of

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1883, and other Acts, they are entitled to liens, as contractors and mechanics, upon so much of the road as is within the limits of the State.

Bonds and stock of the road were issued to an amount exceeding seven millions of dollars, and a mortgage was executed upon the road and its property to the Boston Safe Deposit and Trust Company, to secure the payment of such bonds. Both the railroad and construction company became insolvent, and, under the various pleadings, bills, cross-bills, answers, etc., filed in this cause, the rights of all the persons interested in both companies, so far as their assets in Tennessee were concerned, were submitted to the Court, and passed upon as under a general insolvent proceeding.

Upon hearing of the consolidated causes, the Chancellor, among other things, not necessary now to mention, decreed—

First.—That the two companies were insolvent, and must be wound up as such.

Second.—That the mortgage executed upon the railroad in Tennessee, to secure the bondholders, was invalid for want of authority in the parties who attempted to execute the same.

Third.—That the contracts made by complainants to construct the road were virtually contracts with the construction company and railroad company as one and the same person, and that complainants were entitled to a lien upon the road in Tennessee to secure the amounts due them, which

amounts were declared, subject, however, to be modified as subsequent facts might warrant.

Fourth.—That a confessed judgment rendered in favor of the construction company against the railroad company during the pendency of the insolvent proceeding for the sum of \$715,841.74, was not valid as against the creditors of the railroad company.

The road was brought to sale, so far as it lay within the limits of the State, realizing about \$200,000, which was under the control of the Court below, and was ordered to be paid out as follows:

1. To taxes on the property.
2. To costs and expenses of the receivership.
3. To amounts due for rights of way.
4. Pro rata among the various lien creditors of equal dignity with the liens of complainants.

Neither the railroad company, nor the Boston Safe Deposit and Trust Company, nor the bondholders appealed, and it appears that the bondholders, through a re-organization committee, are now the owners by assignment of the complainants' claims.

The construction company appealed, and insists that the Chancellor erred in holding that it and the railroad company were virtually one and the same, and that the contracts made by complainants are contracts with each as principals; its contention being that it, the construction company, was the principal contractor, and complainants but sub-

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contractors under it, and only entitled to such rights as subcontractors would be entitled to under the laws of Tennessee.

It appears that the construction company was organized before the railroad company, and mainly for the purpose of constructing this road; that it planned, originated, and organized the railroad company, controlled its stockholders, dictated its board of directors, took its stock and bonds and floated them, thereby raising its only assets; that it expended the entire revenues of the railroad company; that the same president dictated, dominated, and controlled the affairs and operations of both companies; that the general manager, treasurer, auditor, and every other active officer was the same person in each company at the same time.

The informal contract entered into between the railroad company and the construction company contained no details, no specifications as to grades, curvatures, character or kind of rails, nor the class or kind of road to be built, except simply that it was to be a road of standard gauge, four feet eight and one-half inches wide.

The original contract provided that the construction company should have \$20,000 of bonds, and a like amount of stock, for every mile of road constructed, but after a short time this agreement was changed to \$25,000 per mile of each, and no reason whatever is shown for the increase, which was made to apply as well to the portion

of the road already constructed as to that part yet to be built.

The railroad company, though organized in 1886, had no books until 1889, it had no assets except its own stock and bonds, and these were issued to the construction company alone, and attempted to be floated by it. The subsidies granted by cities or towns were transferred by the railroad company to the construction company, and the railroad company never had a dollar, except that raised by and through the construction company, and performed no corporate acts, except to make the contract with the construction company, if it can be called a contract, and to execute mortgages, issue its stock and bonds, and make contracts connected therewith, and to make consolidation agreements of its lines. We fail to find, in any of the transactions between the two companies, any evidence of independent dealing at arms' length with each other, but there is at most only the semblance of separate action, the relation between the two being even closer than that of principal and agent, and more nearly representing two persons acting as one in the prosecution of a common enterprise.

The conclusion is irresistible that the two companies were really one and the same, and contracts made with the construction company were in fact and legal effect made with the railroad company; that the construction company was but the mere arm or agency by which the railroad company built the road and floated its stocks and bonds,

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and that the railroad company was but the means through which the construction company was enabled to put into effect its schemes for making money; and they cannot be considered as separate, independent organizations in such a sense as to cut off the rights of parties who have given their labor, services, and material to the construction of the road. We are of opinion that, as to complainants, they each stood in the relation of principal, and as against the roadway, which has been constructed by them and brought into existence through their efforts, they have a lien under the Act of March 29, 1883, and other acts of the State relating to liens of contractors and mechanics. As illustrating our holding, we refer to the cases of *Thomas v. The Peoria & R. I. Ry. Co.*, 36 Fed. Rep., 815; *Hughes v. The Cincinnati & Springfield Ry. Co.*, 15 Am. & Eng. Ry. Cases, 100; *Solomon R. R. Co. v. Jones*, 15 Am. & Eng. Ry. Cases, 201; *Speed v. Atlantic & Pacific Ry. Co.*, 2 Am. & Eng. Ry. Cases, 77. The confessed judgment for \$715,000 is another evidence of identity between the two companies.

We think there is no error in the amount found due complainants on construction account, except an item of \$4,000 interest improperly charged, and the decree of McDonald, Shea & Co., for \$441,094.43, is affirmed, with that correction.

Under the contract between the parties, the amount due was to be left to the estimates of the chief engineer, and the Court has adopted his es-

timates, adding thereto the amount of the "fence accounts" and extra bills shown in the testimony of Englesing, the book-keeper for complainants.

It is insisted that complainants should have no lien upon that part of the road in Tennessee for labor done and material furnished on the line of the road beyond the limits of the State. We need not pass upon this question directly, as there are no persons before the Court upon the appeal who stand in position to make the contest.

It appears that, during the progress of the work, the construction company, being unable to pay cash for work done, executed some \$148,000 in notes to complainants, which they negotiated, after indorsing them, and they are still outstanding, and complainants' liability thereon has been fixed by protest. The Court below properly decreed that these notes should be paid out of complainants' recovery, as well as \$20,000 of similar notes floated by Complainant Kenefick under similar circumstances; and that, upon payment of such notes, the holders should deliver up such collaterals as they hold to secure said notes. It was not proper to require complainants to first take up these notes and deliver them up before they could recover upon their original claim, and thus provide a fund for the payment of such notes.

It results, from our view of the case, that the decree of the Court below, holding that the judgment in favor of the construction company against the railroad company was void as against creditors,

is correct. This necessarily follows from our holding that they are virtually one and the same; and, while the judgment may be treated as valid for the purpose of fixing the status of accounts between the two companies, it cannot affect the rights of third persons.

Other exceptions are taken by the construction company, but they are too indefinite to require examination. We cannot search this immense transcript of ten volumes, containing 4,500 pages of closely type-written matter, to ferret out these exceptions as made. We are satisfied they present no questions not already passed upon.

The petition of W. P. Harris.—W. P. Harris claims debts against the two companies, which are conceded as follows: One debt of \$3,734.40 against the construction company and one of \$1,026.62 against the railroad company for salary account as general superintendent of the railroad company and superintendent of construction of the construction company, also a debt of \$2,601.50 against both companies on account of funds advanced to pay for rights of way and other matters arising in the construction of the road.

We are of opinion, that as to the two items of salary account, the Chancellor was correct in holding that no lien attached to the property of the railroad or construction company. Petitioner cannot be considered as a mechanic, contractor, or subcontractor in the sense of our statutes. He was simply an officer or employe of the two com-

panies at a salary, and while it is true his services were rendered the companies while they were engaged in the construction of the road, this would not give him any lien therefor any more than a lien would exist in favor of any other officer or employe of the companies during the same time. Nor did the petitioner acquire any lien upon the road-bed and way and fixtures by virtue of his attachment, since this attachment was made after the Court had taken charge of the property to administer it under this proceeding, although actual manual caption had not been taken of it by the receiver.

The item of \$2,601.50 for money advanced stands upon peculiar grounds, and will be considered in connection with the claims set up under the petition of H. H. Carr.

Petition of H. H. Carr.—H. H. Carr claims to be a creditor of the two companies to the amount of \$4,760, and this amount was found due him in the Court below, but the Chancellor held that he was entitled to no lien against the property or funds in the cause for its payment.

It appears that Carr was the general attorney for the two companies in Tennessee, and, while acting as such, they became indebted to him in the amount stated for legal services rendered by him, for amounts advanced by him to pay for rights of way, and for costs advanced by him in suits in which he was surety for the companies.

At the institution of this suit he had under his

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control, and in his possession, a large number of title-papers and other papers of value and importance to the two companies, and he claimed the right to hold these papers until the amount owing him for fees and moneys advanced were repaid to him. He also claimed the right to be subrogated to the rights of persons from whom rights of way had been procured, and to have a lien declared upon the rights of way for money expended in procuring the same. This latter claim of lien was not sustained by the Court, but refused, and we think properly, as the petitioner would not be entitled to a lien upon the specific rights of way in the absence of any agreement to that effect, if at all.

It appears, however, that these deeds and other title-papers, and other papers of value, had been placed in the hands of a third person, under an agreement with the president of the companies that they should be held until the amount due Carr should be paid, as well as the amounts advanced by W. P. Harris, as before stated. The Court, seeing that the delivery of these papers into its custody was necessary in order to bring the property to sale free of incumbrance, made an order directing the delivery of these papers into the custody of the Court, and, after evading the order for some time, under a penalty of fine and contempt of Court, the papers were surrendered to the Court. This was done, however, as stated in the order for delivery, without prejudice to the

rights and liens of Harris and Carr, if they had any by virtue of the custody of the papers. It was certainly proper that the delivery of these papers into the custody of the Court should be required and enforced, as thereby the titles to the rights of way were perfected, and the road brought to sale in such way as to insure its fair price, and thus augment the fund realized for the benefit of creditors, and their delivery thus insured to enhance the fund for the creditors.

But the question remains as to the rights of Carr and Harris under these facts. The law is that an attorney, in the absence of any contract to that effect, has a general or retaining lien for a general balance due him arising out of his professional employment, upon all papers of his client which came into his possession in the course of his professional employment. This lien is one in which there is no right of sale. The attorney simply can detain the papers from his client, and the lien is valuable to the extent the papers are necessary and indispensable to the client, or, as stated in some of the cases, to the extent the client can be worried thereby. It is a lien which cannot be actively enforced, and amounts simply to a mere right to retain the papers until a settlement and payment is made. *Brown v. Reid & Bigby*, 3 Tenn. Ch., 621; 13 Am. & Eng. Enc. Law, 615, and authorities there cited.

We are of opinion that Carr, under his lien as attorney, and both Carr and Harris, under the

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agreement made with the president of the two companies, had a right to hold these papers against the companies and the creditors of the companies; and, having been compelled to surrender them under the orders and decrees of the Court, and such surrender having inured to the benefit of the creditors in swelling the funds for their payment, they are entitled, out of the funds realized from the sale of the road, to be paid their debts for which the papers were thus held, and they should be paid in full, next in order after the payment of the right of way claimants.

Petition of C. C. Devault.—We think there is no error in the decree of the Chancellor, denying to petitioner the amount claimed by him for damages to his land by the right of way of the road. We think his claim is barred by the statute of limitations, and, under the orders of the Court, was not filed in time, and, in addition, he has wholly failed to show title and ownership of the land over which the right of way was taken. His petition will be dismissed, but no costs are adjudged against him.

Petition of Jno. Hasson & Co.—Petitioners were subcontractors under McDonald, Shea & Co., and the only matter of controversy with them is as to the amount due them from the principal contractors. They claim a balance of \$25,000, while the Chancellor allowed them only \$10,719.43.

We think the Chancellor was in error to the extent of not allowing them their accounts for

extra work, etc., amounting to \$3,245, and his decree will be modified accordingly. We think as to the other items the decree of the Chancellor is correct, the agreement between the parties being that, upon all matters of difference, the final estimates of the chief engineer shall be conclusive, and the decree of the Chancellor is based upon this final estimate of the chief engineer.

The cost of this petition in this Court will be divided equally between McDonald, Shea & Co. and Hasson & Co., and of the Court below will be paid as adjudged by the Chancellor. The costs of the appeal will be paid one-half by the construction company and the other half out of the funds under the control of the Court below. The costs of the Court below will be paid as adjudged by the Chancellor.

The decree of the Chancellor will be modified as herein indicated, and, except as modified, will, in all other respects, be affirmed, and the cause is remanded, to be further proceeded in.

Foy and Dulaney v. Sinclair.

FOY AND DULANEY v. SINCLAIR.

(Knoxville. October 31, 1893.)

1. PRINCIPAL AND SURETY. *Relation exists, when.*

Where two joint owners of property convey it to secure the debt of one of them, the other assumes in the transaction the attitude of surety for the debt to the extent of the value of his interest in the property thus conveyed.

2. SAME. *Marshaling securities between creditors of.*

And judgment creditors of such surety, having obtained return of execution *nulla bona*, may, by appropriate proceedings in a Court of Equity, compel his principal's creditors thus secured by conveyance of their joint property, to exhaust the principal's interests embraced in the conveyance, and leave the surety's interests, so far as practicable, for the benefit of his own creditors.

Cases cited and approved: *House v. Thompson*, 3 Head, 512; 41 N. J. Eq., 519.

3. SAME. *Release of surety.*

And such surety and his property embraced in the joint conveyance, are released from all liability for the principal's debt therein secured, where the principal, without the assent of the surety, renews the note evidencing the indebtedness, with different indorsers, and is granted by the creditor an extension upon the foreclosure of the joint trust conveyance.

FROM WASHINGTON.

Appeal from Chancery Court of Washington
County. JOHN P. SMITH, Ch.

Foy and Dulaney v. Sinclair.

KIRKPATRICK, WILLIAMS & BOWMAN for Complainants.

ISAAC HARR for Defendants.

McALISTER, J. This is an appeal from the Chancery Court of Washington County. The original bill was filed to marshal and subject certain assets to the satisfaction of a judgment that Dulaney had recovered against the defendant, E. M. Sinclair, and upon which execution had been returned *nulla bona*. It appears from the record that one W. M. Christian borrowed \$5,000 from a bank in Greeneville, executing his note, with G. C. Harris, Isaac Harr, and W. W. Faw as sureties, and that, for the purpose of securing these sureties, Christian conveyed to Robert Burrow, in trust, his residence, valued at about \$5,500, and a lot owned by him. In addition to the residence, Christian conveyed two lots on Watauga Avenue, in Johnson City, which belonged to Christian and E. M. Sinclair as tenants in common.

Dulaney is seeking by this bill to subject Sinclair's interest in the two lots on Watauga Avenue to the payment of his debt. Sinclair joined Christian in the execution of the trust-deed to Burrow, and thus conveyed his undivided interest in these two lots as security to save harmless the indorsers of Christian on the \$5,000 note. In the original bill it is charged, and the proof shows, that defendant, Sinclair, was in no sense

a party to the note executed to the Greeneville National Bank, and that the attitude of Sinclair in this transaction was merely that of a surety. He conveyed his interest in the Watauga Avenue lots to the trustee, Burrow, as indemnity to the sureties, Harris, Faw, and Harr, who had indorsed Christian's note to the Greeneville bank. In the original bill it is charged that the individual property of Christian, conveyed in the trust-deed, was more than sufficient to indemnify the beneficiaries against the trust indebtedness, and it was prayed that the assets be marshaled so as to compel the paramount incumbrancer to subject the property of Christian to the satisfaction of his own debt, and leave the property of the judgment debtor, Sinclair—to wit: his undivided interest in the Watauga Avenue lots—to the satisfaction of complainant's judgment.

It appears that, pending the progress of the cause, A. W. Hoss and C. W. Hodge intervened by petition, asking to be made parties, and alleging they had procured a novation or renewal of the \$5,000 note secured by the trust-deed to Robert Burrow, in which renewal petitioners Hoss and Hodge had become prior guarantors and indorsers of said notes, their liability, as between indorsers, to be prior to that of the beneficiaries in the trust-deed.

It was further averred in said petition that, in consideration of Hoss and Hodge assuming this relation to said paper, the said deed of trust was, by a written and contemporaneous contract, assigned

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to petitioners, together with all the rights of the beneficiaries thereunder.

It may be stated, by way of further explanation, that the original connection of Hoss and Hodge with the transaction was that Christian also owed them \$5,000, and, as security, they had a second mortgage or trust-deed on this property. This second trust-deed was on the property alone of Christian, and was not executed by Sinclair.

As already stated, Hoss and Hodge filed their petition, were made parties, and allowed time to file pleadings appropriate to their defense. They declined, however, to make any defense; but, on the contrary, while the suit for the property was still pending, Hoss and Hodge took a direct conveyance from Christian and Sinclair to all the property conveyed in the original trust-deed, including the undivided interest of Sinclair in the Watauga Avenue lots. Thereupon, complainant, Dulaney, filed his amended and supplemental bill, setting forth the above facts, and seeking to hold Hoss and Hodge liable for one-half of the fair market value of the said lots, that amount representing the one-half undivided interest of Sinclair therein.

The Chancellor held that complainant, Dulaney, as a judgment creditor of defendant, Sinclair, with return of *nulla bona*, by the filing of his original bill herein, secured a lien on the one-half undivided interest of E. M. Sinclair in the Watauga Avenue lots, in Johnson City.

The Chancellor further adjudged that complain-

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ant was entitled to have the trust-deed executed to Robert Burrow, trustee, by W. M. Christian and E. M. Sinclair, to secure the debt of Christian, so enforced and the assets marshaled as that the property of Christian conveyed therein should pay his (Christian's) said debt, leaving the undivided interest of said Sinclair, who was his surety, subject to the operation of complainant's said lien.

The Chancellor was further of opinion that the equity of complainant was superior to any equity shown by the defendants, Hoss and Hodge, who intervened by petition, and that said Hoss and Hodge, by taking a direct conveyance to the whole of said lots, thus preventing a foreclosure of said trust-deed and marshaling of the assets, have made themselves liable to respond to complainant to the amount of the fair cash market value of the one-half undivided interest in said lots owned by E. M. Sinclair, and the Court found said value to be \$550. Defendants Hoss and Hodge appealed, and have assigned errors.

It is insisted that the decree of the Chancellor is erroneous, for the reasons, first, that the right to marshal the assets in this case as complainant seeks to do, does not exist, because the rule by which one creditor who has the right to go upon two funds, may be forced by another creditor who has a lien upon only one of the funds, to seek payment first from the fund to which he can exclusively resort, is confined to cases where creditors have the same debtor, and the funds are the prop-

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erty of the same person. 3 Head, 512. We are of opinion this assignment of error is not well taken, for the reason that the relation of Sinclair to this transaction was merely that of a surety to Christian, who was the principal debtor, and primarily bound, and the conveyance of Sinclair's property was intended as a security to indemnify the indorsers of Christian against liability on account of said indorsements. As surety, it was the right of Sinclair to have the assets so marshaled as to compel the creditors to subject the property of his principal to the payment of the debt secured by the trust-deed before going upon the property of the surety. That right being conceded to the surety, it follows that a judgment creditor of the surety would have the same right. In the case of *Huston's Appeal*, 69 Pa., 485, it was held that if one of the joint debtors is primarily liable, marshaling may be enforced for the benefit of the creditors of the other who is only secondarily liable for the debt.

Again, in *Philadelphia & Reading Railroad Co. v. Little*, 41 N. J. Eq., 519, it was held that, in equity, relief will be afforded to a surety for his indemnity out of the property of his principal, where the equitable rights of the surety may be protected without prejudicing the substantial rights of the creditor, either by an injunction bill to restrain the sale of the surety's property until the principal's property, pledged for the same debt, is first applied, or by a bill for subrogation to the

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creditor's rights against the principal's property, or by marshaling the securities and the application of them to the debt in the order in which they are equitably chargeable according to the circumstances of the particular case. This equity will be enforced in like manner in favor of the creditors of a surety. The principle is well settled that, if the relation of suretyship exists between B and C, so that B is a surety for C's debt, A may be compelled to make him pay who is primarily liable, and leave the surety's property to pay the surety's debts.

We do not, however, further notice this assignment of error, as the case must be decided upon another point. It appears from the record that on the twelfth of August, 1891, there was a novation or renewal of the note to the First National Bank of Greeneville by W. M. Christian as principal, and the said G. C. Harris, W. W. Faw, and Isaac Harr as indorsers, in which renewal A. F. Hoss and C. W. Hodge became prior warrantors and indorsers of said note, and, in consideration of the assumption of this relation of prior guarantors and indorsers by Hoss and Hodge, the said original deed of trust was, by a written contemporaneous contract, assigned to Hoss and Hodge, together with all the rights, powers, and interests of the said Harris, Faw, and Harr, secured as indorsers by said trust-deed. It is now insisted that, as E. M. Sinclair did not agree to the novation, and did not sign the instrument, he was released

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as surety and his property discharged. If this is true as a legal proposition, it follows that complainants will be entitled to a satisfaction of their judgment out of this property, independent of the question of marshaling.

Complainants, as already stated, have a judgment with a return of *nulla bona*, and, upon the filing of their bill, a lien was created upon this property; and if it has been discharged of the lien of a prior incumbrancer, there is no obstacle in the way of subjecting it to sale. It is insisted, however, on behalf of defendants, that the surety was not discharged, because it is not shown he was injured by the delay. It will be remembered that the original undertaking of Sinclair as a party to the Burrow trust-deed was to save harmless, by a mortgage of his property, the original indorsers, Harr, Faw, and Harris, and, by the contract of novation, his undertaking was changed without his assent, and his property was made security for Hoss and Hodge, other and different indorsers.

Again, we are of opinion that Sinclair was released, and his property discharged, by an extension of the foreclosure of the trust-deed, which was made by the contract of novation. The agreement recites on its face, viz.: "And, whereas, the said first-named debt due to said bank is about to mature, and the first-named trust-deed is foreclosable for the benefit of the sureties aforesaid, which foreclosure it is the desire of all parties hereto to prevent." Sinclair was not a party

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to this extension, and we are of opinion it operated to discharge him from the obligation of said original trust-deed, and to release his property therein conveyed.

The decree of the Chancellor will be affirmed to the extent that the Watauga Avenue lots will be subjected to sale for the satisfaction of complainants' judgment. Defendants will pay the costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

MIDDLE DIVISION.

NASHVILLE, DECEMBER TERM, 1893.

TAYLOR v. RAILROAD.

(*Nashville.* December 19, 1893.)

1. MASTER AND SERVANT. *Who are not fellow-servants.*

A car-inspector and the crew of a switch-engine, employed by the company in the same railroad yard, are not fellow-servants. (*Post, p. 307.*)

2. CONTRIBUTORY NEGLIGENCE. *Proper request.*

In suit by a car-inspector against a railroad company for injuries sustained by him from being run over by a switch-engine while standing upon the track performing his duties in the company's yard, where there is controversy as to whether the plaintiff looked and listened continuously while upon the track, it is reversible error for the Court to refuse to charge, upon defendant's request, that it was plaintiff's

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duty to look and listen continuously, so long as he remained upon the track, and that his failure to do so would constitute such contributory negligence on his part as would defeat his action for any negligence of the crew of the switch-engine, unless they saw him on the track and could have prevented the accident and failed to do so. (*Post*, p. 307.)

3. SAME. *Incorrect requests.*

And in such case, there being evidence tending to show that plaintiff was properly on the track, and exercising due diligence at the time of the accident, and also evidence tending to show the contrary, it was not error for the Court to refuse, upon defendant's request, to give additional instruction to the jury to the effect that plaintiff's action would be barred by his contributory negligence if he was upon the track and knew that in the usual course of business an engine was likely to pass about the time of the accident, and failed to keep out of its way. Such request invades the province of the jury and ignores material features of the case. (*Post*, pp. 310-313.)

FROM MAURY.

Appeal in error from Circuit Court of Maury County. E. D. PATTERSON, J.

GEO. C. TAYLOR and W. J. WEBSTER for Taylor.

GEO. T. HUGHES and E. H. HATCHER for Railroad.

McALISTER, J. The plaintiff below was a car-inspector, employed by defendant in the railroad yard at Columbia. While in the performance of his duties, he was struck by a backing switch-engine, which crushed his arm, and necessitated

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amputation. This suit was brought to recover damages against the company for the injury sustained. There was a verdict and judgment in the Court below in favor of the plaintiff for \$1,600. The company appealed, and has assigned errors. The case was before this Court at the last term on the appeal of the company from a verdict and judgment in favor of the plaintiff for \$2,000. The judgment was reversed by this Court, for the reason that the Circuit Judge had refused to charge "that the duty of a person on a track to look and listen for an approaching engine and cars is a continuing duty so long as the person remains on the track, and, if he fails to observe such precautions, and is injured in consequence of his failure to do so, then it would be such contributory negligence on the part of such person as would bar his right of recovery on account of the negligence of those in charge of the engine, unless they saw such person on the track, and failed to take such precautions as were possible to avoid the accident." It was held that this instruction, as applied to an accident in the railroad yard, or in any place where the statutory precautions do not govern, should have been given to the jury, and for this error the case was reversed. It was also held by this Court that the plaintiff, acting in the capacity of car-inspector, and the crew in charge of the switch-engine, were not fellow-servants, but engaged in different and distinct departments of the company's service.

It will be necessary to make a statement of the material facts presented in the record. At the time of the accident, plaintiff was engaged in the performance of his duties as car-inspector in the railroad yard at Columbia. It was his duty to inspect cars in trains coming into Columbia, and, if they needed repairing, to have them detained and uncoupled from the train for that purpose. There were two tracks in the railroad yard—one the main track and the other was known as the passing track. It was the duty of this car-inspector to examine the cars in the trains as they came in on the main track. On the occasion in question, a south-bound local freight-train came in on the main track. The switch-engine backed from the main track to the passing track (which runs parallel with the main track), going north to a point near the depot, in order to receive cars which might be left by the local freight-train. The switch-engine in use was a large Mogul road-engine, with a high back tank and a board across the rear end to prevent the coal from slipping out, and, as thus constructed, an engineer on his seat could not see a person on the track, when looking back over the tank, under seventy-five or one hundred yards. There was proof tending to show that the switch-engine ordinarily in use in other yards had a sloping back tender, so as to allow a better lookout. There was also proof tending to show that the switch-engine came in on this switch in a

hurry, to avoid bumping or running into the passing train on the main track, and that, at the time of the accident, the switch engine was running at the rate of ten or twelve miles an hour; while, on the other hand, there was proof tending to show the rate of speed at the time was only five or six miles an hour, which was not an immoderate or excessive speed.

The plaintiff claims that when the south-bound local freight came in on the main track, he came directly across the main track to inspect the cars; that he stopped on the passing track, and was stooping down, with his back to the west, looking across at the trucks of the local freight; that he heard the ringing noise peculiar to an engine on the rail. He glanced around, and saw the backing switch-engine within eighteen feet, when he sprung from the track, but fell, and his arm was caught, run over, and crushed. Plaintiff testified, and in this testimony he was corroborated, that, before going on the track, he looked up and down, but saw nothing, and whilst stooping on the track, he looked first to one side and then to the other, but did not see the switch-engine until it was within eighteen feet of him. It was claimed by the company that, in going upon the passing track for the purpose of inspecting the trucks of cars on the main track, plaintiff was guilty of gross contributory negligence; that there was a space six or seven feet in width between the main track and the passing track, and that the plaintiff should

have inspected the cars on the main track from this vacant space, which was a place of safety, instead of going upon the passing track, which was a place of danger. It was further insisted on behalf of the company that the cars could not be properly inspected from the passing track, and that the space between the two tracks was the proper and appropriate point for inspection. On the other hand, the plaintiff claimed that he stepped on the passing track because he could get a better view of the trucks on the main track; that he could see them better twelve or fifteen feet off than close to the car, and he had often inspected cars in this way.

J. J. Williams, assistant car-inspector, and a witness for defendant, testified that the distance between the passing track and the main track was sufficient space for the inspector of cars on the main track, without going on the passing track; but he also states that he had occasionally inspected while stooping on the passing track.

There was much conflicting testimony, but we find sufficient evidence to sustain the finding of the jury on the controverted facts.

Error is assigned upon the refusal of the Circuit Judge to give the following instructions in charge to the jury: First, "the plaintiff, being an employe at work in the yards of the company at Columbia, would be bound to take notice of the usual and ordinary course of business and work in the yard, and, if the jury find that upon the ar-

rival of the south-bound local freight-train each day, the switch-engine was accustomed to back up on the passing track to a point at or near the freight depot, for the purpose of receiving the cars which might be left by the local freight and distributing them, then the plaintiff would be bound to take notice of this fact, and keep out of the way of such switch-engine; and, if he took his position on the passing track at or near the place where the switch-engine was accustomed to stand, and was struck or run over by the switch-engine going to its accustomed place, and the persons in charge of the engine did not see the plaintiff in time to prevent the accident, or did not see him at all, then the plaintiff could not recover."

We are of opinion this instruction was properly refused. In the first place it assumes that it would be an act of negligence *per se*, which, as a matter of law, would defeat any recovery, if the plaintiff went upon the passing track at or near the place where he knew the switch-engine was accustomed to pass at that hour. It ignores entirely the contention of plaintiff that he was rightfully there in the performance of his duties as car-inspector. It was of course contended, on behalf of the company, that the plaintiff's duties did not require or even permit him to assume a position on the passing track. But this was a controverted question of fact, which was properly submitted by the Circuit Judge to the determination of the jury. If the Circuit Judge had given the instruction asked, it

would have been an invasion of the province of the jury, and would have amounted to a determination by the Court that the simple fact of going upon the track would defeat a recovery, whether the plaintiff was rightfully there in the performance of his duties or not, and whether he was in the exercise of ordinary care or not.

The Court refused to charge the third request submitted by counsel for the company, to wit: "It would be negligence on the part of the plaintiff if the jury find he took his place on a track where a car or engine was likely to pass at any moment, for the purpose of inspecting a train on the main track, and that even though such position might be the best position for inspection; and if such negligence contributed proximately and directly to the injury, then the plaintiff could not recover in this cause." We are of opinion this instruction was also properly refused, for the reason just stated in respect to the first request. It assumes that if the plaintiff knew that a car or engine was likely to pass at any moment, it would be an act of proximate negligence for him to go upon the passing track, although he went there for the purpose of inspecting a freight-train which was then moving southward on the main track, and notwithstanding this position on the main track might be the usual and appropriate position for inspection. This instruction would exempt the company from any liability, no matter how negligent the crew on the switch-engine might have been. It has never been

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the law that an employe of a railroad who goes upon a track in the performance of his duties, and exercises ordinary care, forfeits all claim to a recovery, and excuses all negligence on the part of the company, simply because he knew a train was likely to pass down that track at any time. Eleventh instruction was also properly refused, because it embodies in another form the same objectionable request.

The judgment of the Circuit Court is affirmed.

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STEWART, RALPH & Co. v. GRACY & BRO.

(Nashville. December 19, 1893.)

1. COMMON CARRIER. *Not liable for loss by fire, when.*

The destruction, by accidental fire, of goods in the custody of the owner's warehouseman is not imputable to the negligence of a carrier who, four days previously, had contracted to remove them, where it appears that the carrier had been diligent, and had been misled as to the warehouse in which the goods were stored, and that the delay was caused by an unusual press of business and the intervention of Sunday and a holiday. (*Post*, pp. 515-319.)

2. SAME. *Same.*

The delivery of goods to a carrier is not complete, and, therefore, his liability for their accidental loss by fire does not attach, where the goods are destroyed in the custody of the owner's warehouseman, after the carrier had contracted to ship the goods and had received the owner's warehouse coupon and an order for delivery of the goods, but had not presented same or issued receipt or bill of lading for the goods. (*Post*, pp. 319, 320.)

Cases cited and distinguished: *Deming v. Railroad*, 90 Tenn., 306; *Watson v. Railroad*, 9 Heis., 255.

FROM MONTGOMERY.

Appeal from Chancery Court of Montgomery County. GEO. E. SEAY, Ch.

HOUSE & MERRITT for Complainants.

BURNEY & GHOLSON for Defendants.

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McALISTER, J. The object of this bill is to hold the defendants liable for the value of twenty-two hogsheads of tobacco which were destroyed by fire while stored in the Banner Warehouse, in the city of Clarksville. The theory of the bill is that Gracy & Bro. were common carriers, engaged in running a line of drays for the transportation of freight; that there had been a constructive delivery of the tobacco to this firm of carriers, and they are liable, first, for negligence in not removing the tobacco from the Banner Warehouse to the Grange Warehouse. It is further insisted by complainants that, independently of the question of negligence, the defendants are liable at all events as common carriers, for the reason there was a constructive delivery of the tobacco to the carrier, and that non-delivery can only be excused by the act of God or the public enemy, neither of which agencies are claimed to have supervened in this case.

The Chancellor was of opinion there had been no delivery of the tobacco to the carrier, either actual or constructive, and upon this ground dismissed complainants' bill.

The material facts necessary to be stated are the following, to wit: The complainants, Stewart, Ralph & Co., are citizens of Philadelphia, where they are engaged in the manufacture of snuff. This firm makes large purchases of tobacco in the Clarksville market, through their local agent, B. F. McKeage, who is regularly employed for this purpose. The defendants, F. P. Gracy & Bro., are the pro-

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prietors of a large warehouse in Clarksville, which is used for the storage of tobacco. This firm is also engaged in the transfer business, carrying freight for hire from place to place in the city of Clarksville, and, as such, are common carriers. It appears that in June, 1892, B. F. McKeage, as the agent of the Philadelphia firm, purchased fifty-six hogsheads of tobacco from the firm of Smith, Anderson & Wood. This firm of Smith, Anderson & Wood were the proprietors of the People's Warehouse, and, not having sufficient accommodations in their own warehouse, they had rented storage room in the Banner Warehouse, which was owned by the firm of Meriwether & Co. The proof shows that twenty-two hogsheads of the lot purchased by McKeage of Smith, Anderson & Wood were on storage in the Banner Warehouse, in the space under the control of Smith, Anderson & Wood. McKeage had contracted with F. P. Gracy & Bro. to store this tobacco in the Grange Warehouse—that is to say, the whole lot of fifty-six hogsheads purchased of Smith, Anderson & Wood. McKeage thereupon delivered to F. P. Gracy & Bro., as common carriers, the warehouse coupons for this tobacco, issued to McKeage, as agent, by the firm of Smith, Anderson & Wood.

It appears that it is the custom of the trade, when a sale of tobacco is made, to issue to the purchaser a coupon for each hogshead. This coupon described the hogshead by number, mark, weight, specifying the warehouse in which it was

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stored, and was an undertaking to deliver it to the bearer of the coupon upon demand. At the time these coupons were delivered to Gracy & Bro., McKeage also gave them a written order on Smith, Anderson & Wood for the tobacco. The order was dated July 2, but the proof shows it did not come into the hands of F. P. Gracy & Bro. until July 3. It appears that nothing was done toward moving this tobacco on the third for the reason there were prior orders which required immediate attention. It appears that, on the second and third of July, a large quantity of tobacco was ordered shipped by rail, and about three hundred hogsheads ordered removed from one warehouse to another, in addition to which there were five hundred hogsheads that required handling. It appears that Gracy & Bro. were at that time working all the force they could handle, and had hired all the teams they could utilize. Their capacity for handling tobacco was from 350 to 400 hogsheads daily. The season in which these events transpired was one of extraordinary activity in that line of business. It was therefore impossible for the defendants to have moved this tobacco on the third of July. The next day was the fourth of July, and a legal holiday. The day following was Sunday. On the morning of July 6 the order and coupons were delivered by Gracy & Bro. to Smith, Anderson & Wood, at the People's Warehouse, where the coupons indicated the tobacco was stored. This warehouse, it appears, had three or four hun-

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dred orders ahead of the McKeage orders, and their capacity for delivering was from one hundred to one hundred and fifty hogsheads daily. Gracy could only receive the tobacco as it was delivered to him by the warehouse, and they received it on their drays as rapidly as the warehousemen turned it out.

It appears that Gracy & Bro. had no knowledge that any portion of this tobacco was stored in the Banner Warehouse. This firm was not notified of this fact either by McKeage or Smith, Anderson & Wood. On the contrary, the coupons were stamped "People's Warehouse," which, in itself, excluded the idea that any part of the tobacco was stored in the Banner Warehouse. On the night of July 7 the Banner Warehouse was destroyed by fire, and the twenty-two hogsheads were consumed in the flames.

As already stated, the object of this suit is to hold Gracy & Bro. liable for the value of the twenty-two hogsheads of tobacco lost in the Banner Warehouse. The first ground upon which liability is claimed is, that defendants were negligent in not delivering the tobacco from the Banner to the Grange Warehouse. Without going further into the evidence, we are of opinion, upon the facts found in the record, that defendants are not chargeable with negligence, but exercised ordinary diligence in trying to effect a removal of this tobacco. While it is true the record shows that defendants knew that Smith, Anderson & Wood

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were occupying a portion of the Banner Warehouse for the storage of tobacco, they had no knowledge that this particular tobacco was stored there, and they are not chargeable with negligence in not knowing it, since the stamp of "People's Warehouse" on the face of the coupon would have led any reasonably prudent man to believe that all of the fifty-six hogsheads were stored in the People's Warehouse.

The next ground of liability claimed is that this tobacco had been constructively delivered to the defendants, as common carriers, and that they thereby became insurers against all losses, except those occasioned by the act of God or the public enemy. The argument of counsel is that the coupons for the tobacco, accompanied by the order from McKeage to move the tobacco, had been delivered to defendants, and entered upon their books. It is insisted the order and coupons had been accepted by the carrier, and that, by virtue of holding them, they had commenced to move, and had, in fact, moved a portion of the fifty-six hogsheads to the Grange Warehouse, where defendant had contracted to carry it. The argument is that these acts constituted a constructive delivery, and the tobacco thereby passed under the control and custody of the carrier for removal, and that the carrier's liability at once attached. We are unable to concur in this contention. The contract of carriage involves a bailment, and ordinarily there must be an actual delivery of the goods to the

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carrier. A contract with a common carrier for the transportation of property being one of bailment, it is necessary, in order to charge him for its loss, that it be delivered to and accepted by him for that purpose. But such acceptance may be actual or constructive. If, for instance, the property be deposited at a designated station, in accordance with a conventional arrangement between the parties in respect to the mode of delivery, or if it be deposited with a third person, who is authorized by the carrier to execute a bill of lading in the name of the carrier, then such mode of delivery is as complete as if the property had been actually deposited with the carrier. To this effect was *Deming v. Railroad*, 6 Pickle, 306. See also *Hutchinson on Carriers*, Secs. 1, 79, 82; *Watson v. Railroad*, 9 Hels., 255. But in the case at bar the tobacco was not deposited with an agent of the carrier, but it was left in the custody of an agent of the shipper, and, constructively, in the possession of the shipper himself. The carrier did not execute a bill of lading or receipt for the property, nor did he in any way acknowledge that the property was in his custody. The carrier in this case simply had an order from the shipper to enable him to get possession of the tobacco. If the warehouseman had refused to recognize the order, and had converted the property to his own use, the carrier would not be liable, simply for the reason that he had never secured the possession of the goods. So in this case, the tobacco was de-

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stroyed by fire before the carrier could get it in his possession; and, as we hold he was guilty of no negligence, he cannot be made liable simply upon the ground that he had accepted an order from the shipper to enable him to get possession of the tobacco.

The decree is affirmed, with costs.

Judges Lea and Caldwell dissent.

21—9 P

 Webster v. Helm.

WEBSTER v. HELM.

(Nashville. January 6, 1894.)

1. MARRIED WOMAN. *Power to charge her equitable separate estate.*

A married woman having unlimited power of disposition may, as surety on a promissory note, bind and charge her equitable separate estate with its payment by express contract to that effect therein contained. (*Post*, pp. 323-327.)

Cases cited and approved: 22 Wall., 337; 15 Vesey, 596; L. R., 6 Ch. Div., 166; *Id.*, 728; 2 Atkyn, 68; 1 L. C. E. (W. & T.), *394.

Cited and distinguished: Embry & Frierson v. Hodge, MS., Nashville, 1879; Maberry v. Neely, 5 Hum., 337; Chatterton v. Young, 2 Tenn. Ch. 772; Arrington v. Roper, 3 Tenn. Ch., 572; McClure v. Harris, 7 Heis., 379; Robertson v. Wilburn, 1 Lea, 633.

2. SAME. *Same.*

And her power of disposition is unlimited, and consequently her power to charge her separate estate by express contract is absolute, when the instrument under which she derives title contains no restrictions upon her power. (*Post*, pp. 323-327.)

Cases cited and approved: Young v. Young, 7 Cold., 461; Parker v. Parker, 4 Lea, 392; Lightfoot v. Bass, 8 Lea, 350; Grotenkemper v. Carver, 9 Lea, 281; Scobey v. Waters, 10 Lea, 551; Menees v. Johnson, 12 Lea, 563; Steifel v. Clark, 9 Bax., 470; Williams v. Whiteman, MS., Jackson, 1875; Lytton v. Baldwin, 8 Hum., 210; Cherry v. Clements, 10 Hum., 552; Kirby v. Miller, 4 Cold., 3; Shacklett v. Polk, 4 Heis., 115; Ragsdale v. Gossett, 2 Lea, 736; Jordan v. Keeble, 85 Tenn., 412; Warren v. Freeman, 85 Tenn., 513; Eckerly v. McGhee, 85 Tenn., 661.

3. SAME. *Same.*

And it is not material that she owns only a life estate and not the fee. (*Post*, p. 328.)

Cases cited and approved: 17 Vesey, 365; 2 Beavan, 245; 1 L. C. E. (W. & T.), *394.

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4. SAME. *Same.*

And privy examination is not essential to her contract to charge her equitable separate estate. The contract may be by parol. (*Post*, pp. 327, 328.)

Code construed: §§ 3347, 3350 (M. & V.); §§ 2486b, 2486c (T. & S.).

Cases cited and approved: *Warren v. Freeman*, 85 Tenn., 513; *Eckerly v. McGhee*, 85 Tenn., 661; *Menees v. Johnson*, 12 Lea, 561.

FROM MAURY.

Appeal from Chancery Court of Maury County.

A. J. ABERNATHY, Ch.

W. J. WEBSTER and G. T. HUGHES for Webster.

FIGUERS & PADGETT for Helm.

CALDWELL, J. De Helm purchased two cows from H. P. Webster, at the price of \$160, for which he and his father and mother executed a promissory note, in the words and figures following:

"\$160.00 COLUMBIA, TENN., Sept. 26, 1892.

"Six months after date we promise to pay to the order of H. P. Webster one hundred and sixty dollars, with interest from date, and the undersigned, Ella Helm, hereby binds and charges her separate estate, both real and personal, especially with the payment of this note.

"[Signed] DE HELM,

"D. C. HELM, *Security*,

"ELLA HELM, *Security*."

Mrs. Ella Helm, the mother, then owned, and now owns, a life estate in a certain valuable house and lot in the town of Columbia, Tennessee, the same having been devised to her by her father to her sole and separate use, without limitation or restriction upon her power of alienation.

The note being past due and unpaid, H. P. Webster, for the use of Maury National Bank, to which he had transferred it as collateral security, filed the bill in this cause against Mrs. Ella Helm and her husband, to enforce its collection by a sale of her interest in said house and lot.

The ground of the relief sought, as stated in the bill, is that Mrs. Helm, by the terms of the said note, specially bound and charged her separate estate with its payment.

Mrs. Helm, answering with her husband, admitted the execution of the note and her ownership of a separate estate as herein stated, but she pleaded her coverture as a bar to any recovery against her personally, and denied that her agreement in the face of the note, to bind and charge her separate estate was of any force or validity, the note being, as to her, a mere surety obligation, assumed without any benefit to her or to her said estate.

The Chancellor adjudged the separate estate liable, and decreed that it be sold for the payment of the debt. Mrs. Helm appealed.

"The separate property of married women may be classified into the equitable and the statutory, the former being that recognized by Courts of

Equity irrespective of statutes, the latter that recognized and created by those statutes which limit the common law rights of the husband in his wife's property, and which enlarge the rights of the wife." 22 Am. & Eng. Ency. of Law, 2, 3.

In this State it is equitable, and not statutory. Therefore, the separate estate of Mrs. Helm belongs to the equitable class, and is subject alone to the rules applicable thereto; and what shall hereafter be said in this opinion will relate exclusively to that class, without calling it by its distinctive name.

With respect to the power of a married woman over her separate estate, there has been great diversity of judicial opinion, both in England and in America. In one of the two principal classes of cases, it has been held that she has no power of disposition, except that clearly given by the terms of the instrument creating the estate; while in the other, the ruling has been that she has every power of disposition, except such as may have been withheld expressly or by necessary implication. After some fluctuation, the latter is now the prevailing doctrine in Tennessee, as it is in England, where the wife's separate estate had its origin. 3 Pom. Eq. Jur., 1104; Adams' Equity, *45; *Young v. Young*, 7 Cold., 461; *Parker v. Parker*, 4 Lea, 392; *Lightfoot v. Bass*, 8 Lea, 350; *Grotenkemper v. Carver*, 9 Lea, 281; *Scobey v. Waters*, 10 Lea, 551; *Menees v. Johnson*, 12 Lea, 563.

A person conveying or devising property to a married woman, to her sole and separate use, may

give her full power of disposition by using affirmative words to that effect, or by mere silence. If, in the settlement, he says nothing on the subject, he is presumed to have intended that she be not limited or restrained in disposing of the property. A settlement without limitation or restriction, therefore, carries with it unlimited power of disposition. Unlimited power of disposition, whether arising from express terms of the instrument creating the separate estate or from the absence of restrictive words, includes unlimited power to charge. *Williams v. Whiteman*, MS., Jackson, 1875; *Steifel v. Clark*, 9 Bax., 470, 471.

This seems as obvious as that the whole includes all of its parts.

With unlimited power of disposition, the married woman may dispose of her separate estate for any purpose she may choose—for her own benefit or for the benefit of another person; and, since unlimited power of disposition includes unlimited power to charge, as the greater includes the lesser, she may likewise charge it with the payment of any debt or engagement she may make, whether as principal, for her own benefit or that of her estate, or as surety for the benefit of another.

This must be so; for if she can dispose of or charge her property for but one purpose, or for particular purposes only, then her power of disposition or to charge is not unlimited, but limited. To be unlimited, the power must include every disposition and every charge made with appropriate formality.

The validity of a married woman's sale of her separate estate depends, first, upon her power to make the sale, and, secondly, upon the mode in which it was made—not upon the purpose for which she disposed of the property, nor upon the use to which she put the purchase-money. The latter matters are important only when made so by the terms of the settlement.

The same is true as to a charge upon her separate estate. Its validity depends upon her power to make the charge and the manner in which it was done, rather than upon her relation to the debt as principal or as surety.

If it be found in a given case, that her power of disposition was unlimited, and that her deed or her charge has been made according to the forms of law, then a Court of Equity will enforce her contract according to its terms.

It is well settled in this State that a married woman, owning a separate estate, without limitation or restriction upon her power of alienation, may charge that estate "with her contracts or engagements" by an *express agreement* to that effect. *Lytton v. Baldwin*, 8 Hum., 210; *Cherry v. Clements*, 10 Hum., 552; *Miller v. Kirby*, 4 Cold., 3; *Shacklett v. Polk*, 4 Heis., 115; *Ragsdale v. Gossett*, 2 Lea, 736; *Jordan v. Keeble*, 85 Tenn., 412.

That agreement is sufficient, and will be enforced in a Court of Equity, not as a lien, but as a mere charge, if contained in the face of a promissory note executed by the married woman (*Warren v.*

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Freeman, 85 Tenn., 513); or, if in parol, the whole contract or engagement being in parol. *Eckerly v. McGhee*, 85 Tenn., 661. Privy examination is not essential to the efficacy of such an agreement. *Menees v. Johnson*, 12 Lea, 561.

In England and some of the States, the intention to make the charge may be inferred; here it must be distinctly expressed as a part of the contract.

The will under which Mrs. Helm holds the property here in question, imposed no limitation or restriction upon her power of disposition; hence, under the rule heretofore stated as now prevailing in this State, her power of disposition was unlimited.

Having unlimited power of disposition, she also had, as an essential part of that power, unlimited authority to charge such property with any contract or engagement she might make, whether it be for her own advantage, or merely as surety for her son; and, having exercised that authority in a legally recognized mode—that is, by an *express agreement* in the face of the note—the charge is valid and should be enforced.

That she owns only a life estate in the property, and not the fee, makes no difference. The charge is good to the extent of her interest. *Bullpin v. Clarke*, 17 Vesey, 365; *Stead v. Nelson*, 2 Beavan, 245; *Huline v. Tenant*, 1 Leading Cases in Equity (White & Tudor), *394 and note.

Until now, this Court has not held that a *feme*

covert, without express authority to that end, may charge her separate estate with the payment of a debt to which her relation is one of suretyship merely; nevertheless, we think such is the plain logic and necessary result of the settled ruling that her power of disposition is unlimited when the instrument under which she claims the property contains no limitation or restriction upon that power. In that sense, and to that extent, the cases establishing that rule are authority for the decision made in this case.

The unreported case of *Embry & Frierson v. J. H. Hoge and wife*, decided by this Court at this place, December term, 1879, is cited and relied on by counsel of Mrs. Helm as an authority precisely in point and directly opposed to the decision made herein. The Court, in that case, after stating the facts of the record, said: "The question then is, had she [Mrs. Hoge, the wife] the power to charge her separate estate for the payment of a security debt of her husband, by the simple execution of a promissory note with this stipulation upon its face?" In answering that question, the Court, upon elaborate consideration of the provisions of the instrument creating the separate estate, held that they repelled "the idea that the grantor intended that the estate should in this mode be made subject to the husband's debts;" and, after so holding, the Court added: "Besides, the weight of authority probably is, that where the power to charge the estate is expressly given, the married woman can only charge

it for her own benefit or for the improvement of the estate. See *Maberry v. Neely*, 5 Hum., 337, and the authorities cited by Judge Cooper in *Chatterton v. Young*, 2 Tenn. Chy., 772."

It is readily seen that the *decision* in that case was put upon the ground, that Mrs. Hoge's power was so restricted by the terms of the settlement that she could not charge her separate estate with her husband's debts. As to what she might have done in that regard had her power of disposition been unlimited, as in this case, the Court did not *decide*, and could not have *decided*, but only expressed the opinion that "the weight of authority probably" was that the married woman, in such a case, could only charge her separate estate "for her own benefit or for the improvement of the estate."

In the case of *Maberry v. Neely*, 5 Hum., 337, the married woman's separate estate was held not to be bound for the payment of bills single, upon the ground, as stated in the opinion, that "she became a party to them as surety for Lee and for her husband, and for no beneficial object or contract of her own." But it did not appear in that case that she had expressly agreed in the bills single to charge her separate estate with their payment; hence, the Court did not there consider, and could not have decided, what the effect of such an agreement would have been.

In *Chatterton v. Young*, 2 Tenn. Chy., 771, it was decided that the notes there involved were not

a charge upon the separate estate of the married woman, because it did not appear that they were signed by her, and, further, because they did not contain an express stipulation charging such estate.

In *Arrington v. Roper*, 3 Tenn. Chy., 572, the married woman's express stipulation to bind her separate estate for debts of her husband, was held to be invalid, because the deeds under which she received the property authorized her to dispose of it for re-investment *only*, thereby excluding her right to make such a charge.

It is true that in each of the last two cases, the learned Judge Cooper, who decided them, expressed the opinion that the better authorities denied the power of the wife to charge her separate estate with debt for which she was surety of her husband (2 Tenn. Chy., 772; 3 Tenn. Chy., 574, 575), but that expression of opinion could not have been, and was not intended as an adjudication of the question.

No more was the question raised, or decided, in *McClure v. Harris*, 7 Heis., 379, or in *Robertson v. Wilburn*, 1 Lea, 633, for in neither of those cases had the wife agreed to charge her separate estate.

Such are the Tennessee cases which may have been supposed to reflect, in some measure, upon the power of a married woman to charge her separate estate with security debts. A brief review of them shows that they do not decide the question.

It is not deemed essential or important to cite or review the conflicting decisions of other Courts

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upon this subject, or to determine upon which side of the question a majority of the adjudged cases are found. It is sufficient to say, that we are convinced that the preponderance of authority and the weight of reason are in favor of the proposition that the charge may be made when the wife's power of disposition is unlimited, as in the case now before us. That has long been the settled rule in England. There the separate estate of a *feme covert* was subjected to the payment of her bond, as surety, in *Heartley v. Thomas*, 15 Vesey, 596; of her guaranty for the price of goods sold to her husband, in *Morrell v. Cowan*, L. R., 6 Ch. Div., 166; of the joint and several note of husband and wife for money loaned to them, in *Davies v. Jenkins*, *Ib.*, 728; of their joint bond for money loaned to him, in *Stanford v. Marshall*, 2 Atkyn, 68; of their joint bonds, one for money loaned to him and the other for money loaned to her, in *Huline v. Tenant*, 1 L. C. E. (W. & T.), *394.

In *Stephen v. Beall*, 22 Wallace, 337, the defense was, that it was not competent for a married woman to incumber her separate property to secure the debts of her husband. Responding to that question, the Supreme Court of the United States, said: "The doctrine that a married woman has the power to charge her separate estate with the payment of her husband's debts, or any other debt contracted by her as principal or as surety, has been uniformly sustained for a long period of time."

Mr. Pomeroy mentions three "general types" of

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American cases involving the question of a married woman's power to charge her separate estate with her contracts of suretyship. He says that in the first of those types, including comparatively few States, she has not that power, but that in the second and third, embracing a majority of the States, she has the power and may make it effective by *express stipulation*. 3 Pom. Eq. Jur., Sec. 1126. It is also said, in 14 Am. & Eng. Ency. of Law, 626, and in 22 *Ib.*, 12 and 13, that such power exists in most of the States.

The third section of Chapter 99, Acts of 1869-70 (Code, T. & S., 2486*c*; M. & V., 3350) is not applicable in this case, because there was no privy examination of Mrs. Helm, as required by the second section (Code, T. & S., 2486*b*; M. & V., 3347) of that Act.

Affirmed.

GATES v. CARD.

(Nashville. January 11, 1894.)

1. DEED. *Delivery and acceptance.*

A deed becomes irrevocable, and invests the grantee with absolute title, where, after being signed and acknowledged, it is delivered to the grantee unconditionally, and retained by him for nearly two years, both parties intending that it should take effect. (*Post*, pp. 335-339.)

2. SAME. *Second deed void.*

And, in such case, no title remains in the vendor, and none can be passed by his subsequent deed to another for the same land. (*Post*, pp. 339, 340.)

3. SAME. *Purchaser's rights.*

And a purchaser from the first grantee upon the faith of his duly registered deed is not affected by the subsequent destruction or cancellation of that deed and conveyance of the land to another by the original grantor. (*Post*, pp. 339, 340.)

4. RESULTING TRUST. *Insufficient evidence of.*

The uncorroborated evidence of husband and wife will not support the wife's claim to a resulting trust in the husband's property where the rights of third persons are involved. (*Post*, 340, 341.)

Cases cited and approved: *Page v. Gillentine*, 6 Lea, 240; *Grotenkemper v. Carver*, 9 Lea, 280; *Hardison v. Billington*, 14 Lea, 346.

5. SAME. *Not available against an innocent purchaser.*

A resulting trust cannot be set up against an innocent purchaser. (*Post*, p. 341.)

Cases cited and approved: *Sandford v. Weeden*, 2 Heis., 71-81; *Gordon v. English*, 3 Lea, 640; *Chadwell v. Wheless*, 6 Lea, 312; *Moore v. Walker*, 3 Lea, 665.

6. ESTOPPEL. *Of married woman by joining husband in signing deed.*

By joining her husband in the execution of his deed, the wife estops

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herself to dispute the grantee's title thereunder, although her name does not appear in the face of the deed as a grantor. (*Post*, pp. 341, 342.)

Cases cited and approved: *Berrigan v. Fleming*, 2 Lea, 271; *Anderson v. Akard*, 15 Lea, 192.

FROM MARSHALL.

Appeal from Chancery Court of Marshall County.
WALTER S. BEARDEN, Ch.

THOS. R. MYERS and JAMES H. LEWIS for Gates.

SWANSON & MARSHALL for Card.

WILKES, J. This bill is filed to perpetually enjoin a writ of possession, issued from the Chancery Court of Marshall County upon a decree and *procedendo* from this Court. The Chancellor granted the relief prayed, and Card and wife have appealed and assigned errors.

The controversy involves the title to a house and lot in Belfast, Marshall County. Prior to the filing of the bill in this cause, there was a litigation involving the same property between the defendants and Thos. Gates, the style of the cause being *Gates v. Montgomery et al.* Upon final hearing of that controversy in this Court, it was decreed that the right to the property was in Mrs.

Card, and the cause was remanded to the Chancery Court of Marshall County, to the end that a writ of possession might issue from that Court to put Mrs. Card in possession, and such writ was issued by that Court. Thereupon, Nannie Gates, wife of Thos. Gates, and C. S. Chapman, as next friend for the minor children of Thos. and Nannie Gates, none of whom were parties to the suit of *Gates v. Montgomery et al.*, filed the present injunction bill to stay and perpetually enjoin the execution of said writ of possession, upon the theory that the house and lot belonged to them, and that Thos. Gates, the father, had merely held it as trustee for them.

It appears that, in April, 1883, Thos. Gates bought the house and lot from B. M. Curtis, and took deed to the same directly to himself and in his own right, and with no conditions, limitations, or trusts. This deed he carried home and placed in a trunk or closet, where it remained until February 10, 1885. At that date another deed was executed by Curtis, conveying the same house and lot to Thos. Gates, as trustee for his wife and children, and with certain limitations not necessary to mention.

What became of the first deed is left in uncertainty. Curtis, the maker, says that he took it up and destroyed it when he executed the second deed, but Gates, the grantee, does not remember whether it was taken up and destroyed by Curtis or not. The last deed remained in Gates' house

until February 14, 1890, when it was registered in Marshall County.

In July, 1885, prior to the registration of this latter deed, but after its execution, Mrs. Card bought the property, and took a deed to the same, signed by Gates and his wife, Nannie Gates, and has paid the purchase-money, and now insists that she is an innocent purchaser from Thos. Gates, without notice of any trust upon the land in favor of Mrs. Gates and her children.

It appears that one R. S. Montgomery acted as agent for Mrs. Card and her husband in purchasing this land from Gates, and during his negotiations with Gates he inquired about the title, and was assured by Gates that it was all right, and, as an evidence of this, exhibited to him the first deed made by Curtis to him, vesting the title to the property in Gates alone and without any trust. Montgomery, after examining the deed, agreed to buy the property if Gates would have the deed registered, which Gates promised to do.

Montgomery, under the impression that the deed had been registered, as promised, prepared a deed to Mrs. Card, which was signed by Gates and wife and delivered to Montgomery or Mrs. Card. A cash payment was made, and notes executed for the balance of the purchase-money. At this time neither Montgomery nor Mrs. Card had any notice of the second deed, which put the title to the property in trust for Mrs. Gates and her children.

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It was in the possession of Gates and wife, and had never been registered.

While Mrs. Gates signed the deed to Mrs. Card with her husband, her name is not mentioned in the body of the deed. It was properly acknowledged by both husband and wife.

About the time of the final decree of this Court in the case of *Gates v. Montgomery et al.*, the result of which was unfavorable to Gates and in favor of Mrs. Card, for the possession of the property, the second deed was registered.

Upon these facts the Chancellor was of opinion, and decreed, that Thos. Gates, the husband, had practiced a fraud upon Mrs. Card, and upon Montgomery, her agent, in representing that he held the land in his own right, and in exhibiting the deed to that effect, but that Mrs. Gates and her children were no parties to this fraud and were not affected by it, and, furthermore, that the father, Thos. Gates, practiced a fraud upon his wife and children in thus making this sale.

He also held that, under the facts as detailed in the evidence, the first deed had never been delivered or accepted, and that the property was bought with the means of Mrs. Gates, under an agreement that the title should be taken to her, as was done by the second deed, and, as a consequence, Mrs. Gates and her children were entitled to the property, and Mrs. Card was perpetually enjoined from obtaining possession of the same, although she was held to be an innocent purchaser for valuable

consideration paid before any notice of the trust character of the property.

The Chancellor in his discretion taxes Gates and his wife with the costs.

We think the Chancellor is in error upon several grounds.

We are of opinion that the first deed was delivered to Thos. Gates, and accepted by him, in April, 1883. It was received by him and placed in a trunk or closet, and retained until February, 1885. It is true he says this deed was not complete, but he fails to state in what sense it was incomplete. It was exhibited by him to Montgomery, the agent of Mrs. Card, as the muniment of his title, and on the faith of it the purchase by Mrs. Card was made. It was then complete, with the exception that it had not been registered, but was signed and acknowledged by Curtis and wife. It is also true that Mrs. Gates says she did not accept this deed. This is, in a sense, no doubt true, inasmuch as the deed was made to her husband and not to her. It was not incumbent on her to accept it, but it does appear that she had full knowledge of it and made no objection to it, and for two years or more made no demand upon Curtis, the maker, for any correction of it, and not until about the time when Mrs. Card had gained the property in her litigation with Thos. Gates, the husband.

Whether the first deed was destroyed or delivered up is uncertain, and, in our view, immaterial.

The title to this property was by it vested in Thos. Gates, the husband, and the canceling, delivery up, or destruction of the deed could not affect Mrs. Card, whose rights had been fixed, in the meantime, on the faith of it. When Curtis made the second deed to Gates for the benefit of his wife and children, there was no title or estate in him that he could convey, and that deed was a nullity as to Mrs. Card, whose rights had intervened.

The only theory upon which Mrs. Gates and her children can hold the property is, therefore, not this deed, but upon the idea that her means bought it, and were invested in it, under an agreement that the title was to be taken to her, and thus establish a resulting trust in her favor.

She states, in general terms, that her property or means contributed to the purchase of this property under such an agreement. She states that at the time she was married she owned some property which she inherited from her mother, and that it had always been agreed between herself and her husband that this should be her individual property, and not that of her husband.

It appears that her marriage occurred some ten years or more before this transaction, and we are called upon to believe that this property, whatever it was, was thus held during this time. She fails to specify in what the property consists, or how it had been kept separate, or how much there was of it. It is worthy of note also that neither she nor her husband state that the wife's money paid

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for the lot, but simply that it contributed to it, but how or to what extent is not stated. The only reference as to the character of the property is the statement of the wife that she had an undivided interest in some land, but whether it was sold and the proceeds invested in this lot there is no evidence whatever. This could not have been the property which she says was agreed to be kept separate, inasmuch as, if it was an undivided interest in real estate descended to her, the title would be vested in her and no agreement would be necessary. The testimony of the husband and wife is in very general terms, and is wholly uncorroborated by any other testimony.

A resulting trust in the wife cannot be sustained upon the uncorroborated testimony of the husband and wife, as against third persons. *Page v. Gillentine*, 6 Lea, 240; *Grotenkemper v. Carver*, 9 Lea, 280; *Hardison v. Billington*, 14 Lea, 346. Neither can it be set up as against an innocent purchaser. *Sandford v. Weeden*, 2 Heis., 71-81; *Gordon v. English*, 3 Lea, 640; *Chadwell v. Wheless*, 6 Lea, 312; *Moore v. Walker*, 3 Lea, 665.

Mrs. Gates has no status in a Court of Equity, because she signed the deed to Mrs. Card with her husband, and, while this may not be sufficient to convey any interest in the land which she might have had, because her name is not used in the face of the deed conveying the property, still it is sufficient to estop her from disputing Mrs. Card's title to the property. *Berrigan v. Fleming*, 2 Lea,

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271; *Anderson v. Akard*, 15 Lea, 192. Her children are mere volunteers, and must stand or fall upon the rights and equity of the mother.

The decree of the Chancellor must be reversed and the injunction dissolved, and a writ of possession will issue from this Court to put Mrs. Card into possession of the property.

The costs of the cause in this Court and in the Court below will be paid by complainants.

Roberts v. Lamb.

ROBERTS v. LAMB.

(Nashville. January 12, 1894.)

SLANDER. *Variance between pleadings and proof. Rule.*

In actions for defamation, the material and actionable words must be proved strictly as they are alleged in the declaration. It is not sufficient to prove equivalent words. The plaintiff need not prove all the words laid in the declaration, unless it takes all of them to constitute the cause of action; but he must prove enough of the words laid to amount to the substance of the charge, and this must be done by proof of the identical words laid. Equivalent words, or words of similar import, will not do. A variance is fatal.

Cases cited and approved: *Hancock v. Stephens*, 11 Hum., 506; *Dawson v. Holt*, 11 Lea, 592.

FROM MARSHALL.

Appeal in error from Circuit Court of Marshall County. ROBERT CANTRELL, J.

A. N. MILLER and SWANSON & MARSHALL for Roberts.

FUSSELL & WILKES, SMITHSON & MERRITT, and W. J. LEONARD, for Lamb.

McALISTER, J. The plaintiff below, Mrs. Mamie Lamb, recovered a verdict and judgment in the Circuit Court of Marshall County against the de-

fendant, Sidney Roberts, for the sum of seven hundred and fifty dollars in an action of slander.

Motions for new trial and in arrest of judgment having been overruled, Roberts appealed, and has assigned errors. The only assignment of error necessary to be noticed is the following, to wit: "Because the substance of the charge is not proven, and because there is a variance between the allegations and the proof." The law on this subject is thus laid down in Newell on Defamation, Libel, and Slander, at page 804, as follows: "In actions for defamation, the material and actionable words must be proved strictly as they are alleged in the declaration. It is not sufficient to prove equivalent words. * * * The plaintiff need not prove all the words laid in the declaration, unless it takes all of them to constitute the cause of action; but he must prove enough of the words laid to amount to the substance of the charge, and this must be done by proof of the identical words laid. Equivalent words or words of similar import will not do. A variance is fatal." To the same effect are our own cases. *Hancock v. Stephens*, 11 Hum., 506; *Dawson v. Holt*, 11 Lea, 592.

It is charged in the first count of the declaration that the defendant, Sidney Roberts, falsely, maliciously, and wrongfully imputed fornication to the plaintiff, Mrs. Mamie Lamb, by saying that she had given birth to a bastard child before her marriage to Lamb, and that said child was yet

alive and about four years old, and that plaintiff was an unchaste woman.

The second count charges that the defendant, Sidney Roberts, used the following language concerning the plaintiff to wit: "That as he passed on the public highway by the plaintiff's residence, he saw plaintiff standing in the door of her husband's home, and that he saw she was in a family way, and too far gone for this to have occurred since her marriage to her husband, and said that was the cause of their separation, and of Mr. Lamb taking her home to her mother, and that Lamb had found out that his wife had been guilty of bastardy before he married her, and that they would never live together again, and he had thought, since his first knowledge of her, that she was not the right kind of a woman."

We have carefully examined this record, with a view of ascertaining whether the language laid in either count of the declaration, or a sufficient number of the words laid to constitute the charge of unchastity, fornication, or bastardy, is to be found in the evidence, and we have wholly failed to find such proof. There is proof of equivalent words or words of similar import, but none of the identical words laid have been proved.

The judgment of the Circuit Court is reversed, and the cause remanded.

Ben Roy Irvine v. Dean.

BEN ROY IRVINE v. DEAN.

(Nashville. January 15, 1894.)

1. ATTACHMENT. *Parties.*

A debtor who has made a general assignment, though a proper party, is not a necessary party, to an attachment suit brought against his assignee and a secured creditor to impound the amount due to the latter under the assignment, and to subject it to the payment of his debts. (*Post, pp. 347-350.*)

2. SAME. *Set-off not allowable.*

Where the creditor of a bank cashier has attached the latter's deposit in the bank, no set-off can be allowed the bank upon the cashier's account, as against such attaching creditor, for unliquidated damages resulting from the cashier's gross mismanagement of the bank's affairs. (*Post, pp. 350, 351.*)

3. CHANCERY PRACTICE. *Sworn answer to a petition.*

The answer, upon oath, of the complainant in a chancery cause to the petition of an intervenor setting up an adverse claim, has not the weight and effect of a sworn answer to a bill where the oath is not waived. Its denial may be overcome by the testimony of a single witness. (*Post, pp. 351, 352.*)

FROM MARSHALL.

Appeal from Chancery Court of Marshall County.
WALTER S. BEARDEN, Ch.

JAMES H. LEWIS and JAMES TURNEY for Ben
Roy Irvine.

Ben Roy Irvine v. Dean.

SWANSON & MARSHALL and C. A. ARMSTRONG for Dean.

P. C. SMITHSON for Bank.

A. N. MILLER for Merriam.

McALISTER, J. Complainant filed this bill for the purpose of rescinding a sale of certain bank stock which he had purchased from the defendant, Dean, and to recover back the purchase-money, upon the ground of fraud in the sale. It appears from the record that, on September 10, 1891, the defendant, Dean, who, at that time, was the cashier of the Bank of Lewisburg, sold to complainant, Irvine, ten shares of the capital stock of said bank—the individual property of said Dean. Complainant paid Dean for the ten shares of stock the sum of \$1,250. As already stated, Dean was at that time cashier of the bank, and had formerly been its book-keeper, and was perfectly familiar with the condition and internal workings of said institution. Complainant, Irvine, knew comparatively nothing of the business of said bank, and relied implicitly upon the good faith of Dean. The latter represented to Irvine that the stock was paying from twenty to thirty per cent. annually, and was, therefore, very valuable. The stock proved to be worthless.

On October 21, 1891—a little more than one month after the stock was purchased—the bank failed, and made a general assignment for the ben-

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efit of its creditors. On October 24—three days after the assignment—complainant filed this bill against the trustees of said bank, making Dean a party by publication. The bill alleges fraud, misrepresentation, and concealment on the part of Dean respecting the value of the stock. Writs of attachment and garnishment issued, and were served on the trustees of the bank, attaching all *choses in action* and effects of Dean in the possession of the bank, including a deposit of \$631 to the credit of Dean, also certain notes amounting to \$500 due from the defendant, Dabney, to Dean, and, likewise, a piano in the hands of defendant, Hayes. Pending the proceedings, one Willard Merriam, of Kansas, intervened by petition, and asserted a claim to the Dabney notes.

The Chancellor, upon the pleadings and proof, decreed a rescission of the sale of the stock, and pronounced a decree in favor of the complainant for \$1,279.30, amount of the purchase-money, with interest, and ordered that the piano attached in the cause be subjected to the satisfaction of the decree. The Chancellor, however, was of opinion that complainant had not effectually impounded any indebtedness of the Bank of Lewisburg to defendant, Dean, or funds in the hands of the trustees of said bank, and was therefore entitled to no relief in that respect. The Court further decreed that petitioner, Merriam, had established his title to the Dabney notes, and was entitled to all of said notes in the hands of the Clerk. Complainant,

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Irvine, appealed from so much of said decree as denied satisfaction of his decree out of the Dabney notes and the bank deposit to the credit of Dean, amounting to \$631.

The first error assigned is that the Chancellor should have subjected the Dean deposit to the satisfaction of complainant's decree. It is insisted there was no error in this, for the reason that the bank was not a party to the bill and attachment proceedings under which it was sought to reach the indebtedness by deposit from the bank to Dean, and compel the bank to pay this debt to Irvine. The bill alleges that Dean had a deposit of \$600 in bank, and the Court held that no decree could be rendered against the bank for this deposit, because the bank had not been made a party to the bill. It is insisted by appellants that it was not necessary to make the bank a party; that it was sufficient to make the trustees under the assignment parties; that the deed of assignment conveyed to the trustees all the assets of the bank, and necessarily included the deposits, and that such was the intention of the bank in making the assignment.

We are of opinion that complainant, by virtue of his garnishment attachment served upon the trustees of the bank, fixed a lien upon Dean's deposit, and whatever amount may be due Dean in the distribution of the assets of the bank may be subjected to the payment of complainant's decree. We are further of opinion that while the

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bank would have been a proper party, it was not a necessary party, since the trustees are the representatives of the bank, and hold the fund sought to be reached by the garnishment.

It appears that the trustees answered that they did not hold any deposit, as alleged, subject to attachment until a settlement should be had of Dean's account with the Bank of Lewisburg. This answer was, of course, not conclusive, and the proof shows that, at the date of the service of the garnishment, the trustees, as the representatives of the bank, were indebted to Dean, on account of his deposit, in the sum of \$631, and, at that time, Dean was not indebted to the bank, by account, note, or judgment. It is, however, insisted on behalf of the trustees that Dean was guilty of gross mismanagement of the affairs of the bank, in discounting worthless paper, in reckless investment of the bank's money, and other acts of misfeasance and malfeasance in office as cashier of said bank. The trustees claim that Dean is liable to the bank for an alleged sum of \$5,000, on account of mismanagement, and they claim the right to hold this deposit as partial indemnity to the bank. There was no debt due the bank by account, note, or judgment at the date of the service of the garnishment, and a set-off against this deposit, on account of Dean's mismanagement of the affairs of the bank, cannot be maintained. The claim of the trustees is unascertained and unliquidated, and

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is the subject-matter of future litigation between the bank and Dean.

The next assignment is that the Dabney notes should have been subjected to the payment of complainant's decree. It is insisted that the transfer of these notes from Dean to Merriam was merely colorable, and for the purpose of defeating complainant in the collection of his debt. These notes were executed on October 11, 1891, by Dabney to Dean for the purchase of lots lying in Lewisburg. As already stated, Merriam filed his petition in these proceedings, claiming the Dabney notes had been transferred to him. The deposition of Dean was taken, who proves that these notes were transferred in good faith to Merriam, in part payment of an interest purchased by the former in an insurance agency in Kansas City, and at a time anterior to the filing of the bill in this case. While there are some circumstances surrounding this transfer calculated to awaken suspicion, there is no evidence of fraud. The burden of proof to establish fraud in the transfer devolves upon the complainant.

It is insisted, however, that the petition of Merriam, setting up title to these notes, does not waive an answer under oath, that complainants, in their answer to this petition, deny every material averment in respect to the transfer of the notes, and that the answer is sworn to. The insistence is that the sworn answer to a petition is equivalent to two witnesses, or to one witness with cor-

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roborating circumstances. It suffices to say that this rule of chancery practice is only applicable to bill and answer, and has never been applied to a simple petition. There was, then, no proof upon which the Chancellor could have subjected the Dabney notes to the payment of complainant's decree, and the decree, in this respect, is affirmed. But, in respect to the deposit of Dean, the Court holds that complainant, by service of his attachment by garnishment upon the assignees of the bank, fixed a lien upon Dean's interest in that deposit, and complainant will be entitled to recover whatever amount is due Dean on the settlement of the trust assignment.

The decree of the Chancellor in this respect is reversed, and in all other respects affirmed.

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AKIN v. JONES.

(Nashville. January 17, 1894.)

1. BANKS AND BANKING. *Relation of collecting bank to its customer. General assignment.*

A customer, for whom a bank makes a collection and remits the fund collected by check upon another bank, which is not paid upon presentation, becomes a mere creditor of the collecting bank for the amount of such fund, and entitled to share only *pro rata* with other general creditors under a general assignment subsequently made by the bank, unless, by special contract, express or implied, the bank was constituted trustee of such fund for its customer, and the fund remains susceptible of identification. (*Post*, pp. 360-364.)

Case cited and distinguished: 5 Am. St. Rep., 85.

2. SAME. *Same. What constitutes collection.*

And the collecting bank, not its assignee, has, as between itself and customer, effected the collection of the latter's debt, and become debtor for the fund, where the bank, before making a general assignment, accepted, in absolute payment of the debt, the check of its customer's debtor upon itself, overdrawing his deposit, and this overdraft was subsequently collected of the drawee by the assignee of the bank, for benefit of all its creditors. (*Post*, pp. 360-364.)

Case cited: Howard & Co. v. Walker, 92 Tenn., 456.

3. SAME. *Rights of holder of protested check.*

A bank's check in favor of its creditor, upon its funds standing to its credit in another bank, which the latter bank declines to accept or pay, does not operate as an equitable assignment to the payee of any part of the drawer's fund on deposit in the drawee bank, so as to give the payee a prior claim upon the fund when it is collected and distributed under the drawer bank's subsequent assignment for the benefit of all its creditors. (*Post*, pp. 364-368.)

Cases cited and approved: Imboden v. Perrie, 13 Lea, 504; 71 N. Y., —; 83 N. Y., 318; 46 N. Y., 87.

Cited and distinguished: Springfield v. Green, 7 Bax., 302; Schoolfield v. Moon, 9 Heis., 173; Bank v. Merritt, 7 Heis., 193.

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4. ASSIGNMENT, GENERAL. *Assignee's attitude.*

Doctrine re-affirmed that an assignee takes the debtor's estate, under a general assignment for benefit of his creditors, not as a purchaser for value, but as a volunteer and representative of the assignor, and subject to all equities and defenses that would have been available against the assignor himself. (*Post*, p. 364.)

Case cited and approved: *Trust Co. v. Bank*, 91 Tenn., 336.

FROM MAURY.

Appeal from Chancery Court of Maury County.
A. J. ABERNATHY, Ch.

SAM HOLDING, E. H. HATCHER, and GEORGE T.
HUGHES for Akin.

J. C. McREYNOLDS for Jones.

McALISTER, J. The question presented in this record, stated in general terms, is, whether the holder of two certain checks drawn by the Bank of Columbia prior to making a general assignment, is entitled to payment in full out of certain funds in the hands of the assignee of said bank, or whether said check holder is merely a general creditor of said bank, and, as such, only entitled to a ratable share in the distribution of its assets. It appears from the record that on October 17, 1891, the Bank of Columbia made a general assignment for the benefit of its creditors. The

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trustee named in the deed having declined to serve, A. N. Akin was duly appointed and has been administering the trust. The present bill was filed by the trustee against the creditors of said bank for the settlement of all matters growing out of said trust, and for the adjudication of all questions of priorities.

The defendants, J. W. Manier & Co., are merchants doing business in Nashville, and, on or about September 29, 1891, inclosed to the Bank of Columbia a draft on Massey & Son, of Lipscomb, Tenn., for the sum of \$137.20, drawn by Manier & Co. to their own order and indorsed by said firm to the Bank of Columbia for collection. Massey & Son, the drawees of said draft, on October 15, 1891, gave their check on the Bank of Columbia in payment of said draft, which overdrew their account in said bank in the sum of \$102.12. It appears that Massey & Son had to their credit in said bank, at the time of drawing the check, the sum of thirty-five dollars. The draft was canceled by the bank and delivered up to Massey & Son. Manier & Co., in their letter inclosing the draft for collection, had directed the bank to remit the proceeds in New York exchange. On October 16, 1891, the Bank of Columbia sent to Manier & Co. its check on the Merchants' National Bank of Louisville, covering proceeds of draft on Massey & Son. Manier & Co. received said check on October 17, and immediately telegraphed to the Merchants' National

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Bank of Louisville to know if this check would be paid, and were informed that it would not be paid. It appears that on the same day the Bank of Columbia made a general assignment for the benefit of its creditors. Manier & Co., on the same day, returned this check to the Bank of Columbia, informing its cashier they would claim payment in full out of the assets of said trust. It further appears, that at the time Manier & Co. received the draft on the Merchants' National Bank of Louisville, Ky., there was to the credit of the Bank of Columbia in said Louisville bank something over \$2,250. All drafts drawn on the Louisville bank by the Bank of Columbia subsequent to October 14, 1891, were refused payment when presented. Some time after the assignment, the Merchants' National Bank of Louisville, with the assent of the trustee of the Bank of Columbia, but without the knowledge of Manier & Co., paid out of the funds to the credit of the Bank of Columbia such drafts as had been presented to it, in the order of presentation, until the whole fund was exhausted. The telegram sent by Manier & Co. to the Merchants' National Bank was received, and payment of their check refused, before the presentation of many of the drafts which were afterwards paid. No offer has been made to pay the draft held by Manier & Co., and there are now no funds with which to pay it to the credit of the Bank of Columbia in the Louisville bank. It further appears, that after the affairs of the

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Bank of Columbia went into the hands of the assignee, Massey & Son paid their overdraft, amounting to \$102.12, in full to said assignee. This is a full statement of facts appearing in the record with respect to the check on the Merchants' National Bank of Louisville given by the Bank of Columbia to Manier & Co. for the proceeds of their draft on Massey & Son.

The other claim of Manier & Co. is based upon the following statement of agreed facts: It appears that, on or about September 8, 1891, Manier & Co. inclosed to the Bank of Columbia for collection the note of W. K. Stephens, dated July 3, 1891, payable to the order of Manier & Co., and due October 1 thereafter, for the sum of \$195.95. The bank was directed to remit the proceeds of the note to Manier & Co. in New York exchange. On October 13, 1891, W. K. Stephens, the maker of this note, paid it by an overdraft on the Bank of Columbia. At the time his check was given, the account of Stephens was overdrawn in the sum of \$1,100, and had remained overdrawn since May 31, 1891. On October 13, 1891, the Bank of Columbia sent to Manier & Co. their check on the Importers' and Traders' National Bank of New York for the sum of \$195.45, with the advice that it was given for the amount collected on the Stephens note. This check was received in due course of mail by Manier & Co. and at once forwarded by them to New York and presented for payment. Payment was refused, and thereupon

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the check was protested and all proper notices given. Manier & Co. immediately notified the trustee for the Bank of Columbia, and made claim on him for the full amount of the check.

As already stated in connection with the Massey & Son draft, the Bank of Columbia, on October 17, 1891, made a general assignment for the benefit of its creditors. It further appears, that when the check was presented to the Importers' and Traders' National Bank of New York, there was to the credit of the Bank of Columbia in the New York bank sufficient funds to meet it. Subsequent to presentation of defendant's check, the Importers' and Traders' National Bank paid to the trustee of the Bank of Columbia the balance to the credit of said bank, and this amount the trustee now holds as a separate fund, subject to the orders of the Court in this case. It should be stated that, after the affairs of the bank went into the hands of the assignee, it was ascertained that Stephens' account was overdrawn on October 16, the last day the bank transacted business, in the sum of \$1,400, and that it had been overdrawn more than \$300 since July 31, 1891. The assignee, acting upon advice of counsel, afterwards compromised and settled Stephens' overdraft, realizing something more than fifty per cent. of same, which went into the trust fund.

Upon the foregoing facts the Chancellor decreed, viz.: First, that Manier & Co. had the right to repudiate the check on Louisville given by the

Bank of Columbia in payment of the Massey & Son draft, in violation of instructions to send New York exchange. Second, that in respect to the amount of Massey & Son's overdraft on the Bank of Columbia—to wit, the sum of \$102.12—which was made by paying to the said bank the draft of Manier & Co. on Massey & Son, and which was collected by the trustee of said bank after its failure, that, as to this amount, Manier & Co. were entitled to be paid in full and in preference to the general creditors of said bank. Third, but as to the sum of thirty-five dollars which Massey & Son had on deposit when they gave their check to the bank for the draft of Manier & Co., and which, therefore, the bank actually received before its failure, that, as to this amount, Manier & Co. were not entitled to be paid in full in preference to the general creditors of said bank, but were only entitled to receive their *pro rata*. Fourth, that, as to the Stephens' collection, Manier & Co. accepted the check on the Importers' and Traders' National Bank in payment of said collection, but that said check was not an equitable assignment *pro tanto* of the funds of the Bank of Columbia in the hands of the New York bank, and which afterwards came into the hands of the trustee of the Bank of Columbia, and that, therefore, Manier & Co. were only general creditors of said Bank of Columbia, and, as such, were only entitled to receive their *pro rata* upon said note.

From so much of said decree as adjudges that

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Manier & Co. are entitled to be paid in full the sum of \$102.12 in preference to the general creditors of the Bank of Columbia, the complainant, A. N. Akin, appealed, and has assigned errors. The defendant, Manier & Co., have appealed from so much of said decree as adjudges that they are only entitled to receive their *pro rata* upon the check of the Bank of Columbia on the Importers' and Traders' Bank of New York, given in payment of the Stephens note.

It is assigned as error by counsel for A. N. Akin, trustee, that the Chancellor adjudged that Manier & Co. were entitled to be paid in full, in preference to the general creditors, the amount of Massey & Son's overdraft, which was collected by the trustee. It is insisted, on behalf of the trustee, that, although indorsements for collection vest no title to the draft in the bank, and if the draft is collected by the trustee of the bank after its failure, the law impresses a trust upon the proceeds in favor of the owner, yet, if the draft is collected by the bank before its failure, and while it is a going concern, and the transaction of payment is complete between the bank and the drawee, then the relation of the bank to the owner of the draft is that of debtor and creditor and there is no trust in favor of the owner, and he has no preferred lien upon the assets of the bank in the hands of the assignee, but can only take his *pro rata* share in the distribution of the assets.

On the other hand, it is insisted on behalf of

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Manier & Co., that when paper is sent to a bank indorsed for collection, with instructions to remit the proceeds, the bank holds said paper as the agent or trustee for sender, and funds collected on same are trust funds, held by it for sender; that the bank in this case held the collections, as agent or trustee, charged with the duty to collect them in money, which, if received, would have been a trust fund, but as the bank improperly received an overdraft or debt against the maker, the owners of the collection can claim these overdrafts or debts in the hands of the assignee. Defendants Manier & Co. further insist, that if these overdrafts, made to pay their drafts, were afterwards paid to the assignee, it amounted, in a Court of Equity, to a payment of the collections themselves.

The general rule on this subject is, that an indorsement for collection vests no title to the paper in the bank, and if the paper passes into the hands of the assignee after insolvency, the owner may recover it specifically, or, if the assignee collects the paper, the owner may recover the proceeds. But if the bank makes the collection before the assignment, it simply becomes an ordinary contract debtor of the owner, and he cannot impress any trust upon the proceeds. Morse on Banking, Vol. I., Sec. 248. Of course there may be special facts in a case which will take it out of the ordinary rule, and create a trust in the funds collected. Such special facts were found in the case of *Continental National Bank v. Weems*, 5 Am.

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State Reports, page 85, cited by counsel for defendant. In this case the agreement between the two banks in reference to the proceeds was that "they should be preserved by said bank as the property of the complainant, and returned to it as such." The Court thought these special facts settled the question of trust in favor of the complainant. But the rule undoubtedly is, that unless there is some agreement or course of dealing whereby the funds are to be held separate and the identical proceeds remitted, the owner of the drafts stands upon no higher ground than the other creditors of the bank in a case where the bank collects the draft prior to making a general assignment.

It will be noticed that in this case Manier & Co. directed the bank to send New York exchange—that is to say, Manier & Co. directed the Bank of Columbia to send them its check on New York in payment of the proceeds of collection. As stated by counsel, "this is the determining fact in the record. It was virtually an express direction not to send the identical moneys collected nor to hold them separate for Manier & Co., but was equivalent to an agreement that the bank might use the money collected and pay Manier & Co. by its check on New York. Any agreement or understanding or course of dealing whereby the bank is to use the identical moneys collected and substitute its own obligation in its stead, destroys all idea of a trust."

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It is argued, however, that the overdrafts made by the drawees on the Bank of Columbia to pay their drafts due to Manier & Co., were afterwards paid to the assignee, and such payment amounted, in a Court of Equity, to a payment of the drafts themselves to the assignee. This view of the case cannot be maintained. The transaction between the bank and Massey & Son and W. K. Stephens, the drawees of the drafts, was a completed transaction. Massey & Son and Stephens gave their checks on the Bank of Columbia for the amount of the drafts drawn against them, respectively, and the drafts were canceled and delivered up to the drawees. The fact that the bank allowed the drawees to overdraw their accounts, does not affect the question of payment. In his work on Commercial Paper Mr. Randolph says: "If the holder of a bill directs that it be paid to a certain banker, procuring credit with such banker will amount to a payment of the bill. So, if the amount of a note is credited to a bank holding it for collection (according to the custom of dealing between the banks), it will be a payment, although the bank making the note and giving the credit failed on the day it was so credited." Randolph on Com. Paper, Vol. III., Secs. 1395-1456.

The doctrine has been extended, and collecting banks have been recognized as authorized to receive their own certificates of deposit in payment, and the debtor is discharged, even though the bank

fails before remitting. See *Howard & Co. v. Walker*, 8 Pickle, 456.

The next question presented is in respect to the check given by the Bank of Columbia on the Importers' and Traders' National Bank of New York in payment of the Stephens note. It is insisted by counsel for Manier & Co. that they are entitled to be paid in full, for the reason that this check was an equitable assignment *pro tanto* of the funds of the Bank of Columbia in the hands of the New York bank, and that, the New York bank having refused to pay the check, and having returned the funds in its hands to the trustee of the Bank of Columbia, defendants are entitled to the payment of this check in full. It is insisted that the assignee for the benefit of creditors takes the property and chuses in action of his assignor, not as a purchaser for value, but as a volunteer, and therefore subject to all the defenses and equities against them in the hands of the assignor, and not only so but that he holds as the representative of the assignor and his estate. This principle is well settled, and will not be further noticed. *Nashville Trust Co. v. Fourth National Bank*, 7 Pickle, 336.

The other question, however, in respect to equitable assignments, is involved in much conflict of authority. Mr. Morse, in his work on Banking, Vol. II., Sec. 493, formulates the question thus: "Is a check an equitable assignment between the drawer and a *bona fide* holder for value, so that

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the latter will be preferred over general creditors of the drawer in case of his insolvency before the check is cashed?" The author answers the question by stating that "the most numerous body of decisions sustains the view that a check is neither a legal nor an equitable assignment as between drawer and payee, nor a sufficient foundation for any action by the holder against the bank." The author qualifies the statement with the remark that there may exist special facts giving an equation of easy solution, as if the check is drawn on a designated fund, or is accepted by the bank, or, if the bank charges the amount to the drawer or settles with him on the basis of allowing for the check. In these and other instances enumerated, the author states there is no doubt the bank can be held in an action by the holder. Counsel for Manier & Co. cite several *dicta* to be found in our own cases, to the effect that a check is an appropriation by the debtor of so much of his deposit in bank to his creditor. See *Springfield v. Green*, 7 Bax., 302; *Schoolfield v. Moon*, 9 Heis., 173; *Planters' Bank v. Merritt*, 7 Heis., 193. It will be found, upon an examination of these cases, that the only question presented for adjudication was in respect to the liability of the drawer—whether he was discharged by the failure of the holder to present his check in a reasonable time—the bank in the meantime having become insolvent. The case of *Imboden v. Perrie and Wife*, 13 Lea, 504, involved more of the features presented in this case than any other

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reported in this State. In that case the question arose between creditors. One creditor held a check of the debtor against a general deposit of the debtor in bank, while the other was an attachment creditor of that fund. The question was fairly raised in that case whether the check worked an equitable assignment of the fund in bank to the check holder before the presentation of the check or notice to the bank. If so, the check-holding creditor was entitled to priority. If not, then the attachment had priority. Judge Turney, in delivering the opinion of the Court against the defendant's theory of equitable assignment, cited approvingly the opinion of Chief Justice Church in *Attorney-general v. Continental National Bank*, 71 New York, to the effect that "checks drawn in the ordinary form, not describing any particular fund or using any words of transfer of the whole or any part of any amount standing to the credit of the drawer, but containing only the usual request, are of the same effect as inland bills of exchange, and do not amount to an assignment of the funds of the drawer in bank. This doctrine," he continues, "accords with the relation between the parties. Banks are debtors to their customers for the amount of their deposits. A check is a request of the customer to pay the whole or a portion of such indebtedness to the bearer or to the order of the payee. Until presented and accepted, it is inchoate, it vests no title, legal or equitable, in the payee, to the fund. Before acceptance, the drawer

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may withdraw his deposits. The bank owes no duty to the holder until the check is presented for payment. Knowledge that checks have been drawn does not make it obligatory upon the bank to retain the deposits to meet them. These rules are indispensable to the safe transaction of commercial business."

It is contended by counsel for Manier & Co. that the case of *Imboden v. Perrie and Wife* did not raise the identical question here presented. It is insisted that the question in that case arose between creditors, but that the question presented here is between the drawer and the payee of the check, the assignee standing in the shoes of the drawer. The case of *Attorney-general v. Continental Life Ins. Co.*, 71 New York, cited with approval by Judge Turney in the 13 Lea case, presented the exact state of facts found in this record. In that case the insurance company gave its check upon a trust company in payment of a loss, the company having at the time on deposit a sum exceeding the amount of the check, but, prior to its presentation, a receiver of the insurance company was appointed, who withdrew all the funds deposited with the trust company. In an action by the check holder against the receiver to recover the full amount of the check out of the funds in his hands, it was held by the Court of Appeals of New York that the check, not having been drawn on a particular fund, was not an equitable assignment *pro tanto* of a general deposit,

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and that the check holder was not entitled to payment in full in preference to the claims of other creditors. See, also, *Risley v. Bank*, 83 N. Y., 318; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y., 87.

We are of opinion that the great weight of authority is opposed to the contention of defendant, and establishes the doctrine that the delivery of a check against a general deposit is not a legal or equitable assignment of any portion of the fund.

The decree of the Chancellor, to the extent that it allows defendants priority in the payment of the Massey & Son overdraft, is reversed, and in all other respects affirmed. The costs will be paid by the trustee.

POSTAL TELEGRAPH-CABLE Co. v. ZOPFI.

(Nashville. January 18, 1894.)

I. CONTRIBUTORY NEGLIGENCE. *Correct charge.*

In an action against a telegraph company for injuries incurred by plaintiff's infant daughter by her fall upon a telegraph-pole negligently left in front of his residence, where the defense is plaintiff's contributory negligence in failing to remove the pole himself within a reasonable time, it is not error for the Court to state, in addition to other unexceptionable propositions, that if such negligence of the plaintiff simply contributed to or assisted in bringing about the injury without being its efficient cause, while the defendant's negligence remained as the efficient and controlling cause, then plaintiff's contributory negligence will not defeat the action entirely, but must be considered in mitigation of damages only.

Cases cited and approved: *Dush v. Fitzhugh*, 2 Lea, 307; *Whirley v. Whiteman*, 1 Head, 610; *Railroad v. Fain*, 12 Lea, 40; *Railroad v. Fleming*, 14 Lea, 135.

2. SAME. *Concurrent with natural cause.*

One who has negligently left a telegraph-pole in an improper position is liable for injury sustained from a fall upon it by one necessarily stepping over it, although the wetting, by rain, of the platform on which such person steps may contribute partially or wholly to his fall, when it is reasonably certain that the latter cause alone would not have been sufficient to produce the injury sustained.

Cases cited and approved: *Deming v. Cotton Press Co.*, 90 Tenn., 353; *Railroad v. Kelly*, 91 Tenn., 705; 41 Am. Rep., 612; 27 Am. Rep., 396; 50 Am. Rep., 567; 22 Am. Rep., 733; 16 Am. Rep., 33; 4 L. R. A., 406.

FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson
County. J. W. BONNER, J.

Postal Telegraph-Cable Co. v. Zopfi.

VERTREES & VERTREES for the Telegraph Company.

JAS. TRIMBLE, JNO. RUHM & SON, E. L. GREGORY, and A. J. CALDWELL for Zopfi.

WILKES, J. This is an action for damages for personal injuries sustained by the plaintiff's minor daughter at the hands of the defendant, Postal Telegraph-Cable Company. Plaintiff seeks a recovery upon the ground of loss of services of his daughter.

There was a trial before the Court and jury, resulting in verdict and judgment for the plaintiff for \$1,159 and costs, from which the telegraph company has appealed, and it has assigned errors.

The errors assigned are to the charge of the Court as given, and the refusal to give other charges as requested, and that the verdict is not sustained by the evidence.

The plaintiff is a farmer and dairyman, living on the Gallatin pike about three miles north of Nashville. In September, 1890, his daughter Emma, then about thirteen years of age, was returning to her home from school along the turnpike road one evening through a rain. She was carrying an umbrella over her and had a satchel of books in her hands. When she reached her father's place, she attempted to pass from the turnpike over some stepping-stones to the front gate. In front of this gate there was a platform, which had been constructed by the plaintiff to avoid stepping in the mud in

passing through the gate. This platform was about four feet wide and four and a half feet long. There is some controversy and uncertainty about its elevation or height above the ground, but it was probably about fifteen inches high.

The telegraph company was then engaged in constructing a line along the turupike between Nashville and Gallatin, and had hauled long poles on wagons, and thrown them out at intervals along the road on the side next to plaintiff's premises. One of these peeled chestnut poles was thrown partially in front of this platform, the larger end extending about one-half the length of the platform. The smaller end extended about thirty feet towards Nashville, along and in front of plaintiff's yard. There is some conflict and uncertainty about the size of this pole, but it is conceded by defendant that it had a circumference of twenty-seven and a diameter of nine inches at its larger end, in front of the platform. It was thrown about six inches from the stepping-stone, which was flush with the ground, and about twelve or fifteen inches from the edge of the platform. It lay between the stepping-stone and the platform, and in passing from the stone onto the platform and through the plaintiff's front gate, a person must necessarily step on or over it. This could be avoided by passing around the end of the pole a few feet, through the mud and water, and thus reaching the platform without crossing the pole.

The young girl had not been in the habit of

going to school by this route, but usually went through a side gate and her father's field or lot, reaching the pike at a different point.

A short time before the accident occurred, the field had been plowed up, and she could not at this time reach her father's house by the usual route on account of the rain and plowed ground. In attempting to pass on this occasion from the stepping-stone onto the platform and through the gate, the young lady did not step on the pole, but over or across it to the platform, when the platform, being saturated and slick with the falling rain, her foot slipped on the platform, and she fell backward, her hip striking the pole. The consequence was a severe injury, which confined her to her bed for many months, and permanently crippled and disabled her. She suffered great pain, and for some time her life was despaired of, but for this pain no damages are sought in this action, another suit having been brought for her benefit in the Federal Court on this account.

Among other things, the Court charged the jury as follows: "If the proof shows that the plaintiff knew, or by the exercise of ordinary care and diligence might have known, that the pole was so placed in front of his gate and platform as to render it dangerous for a child of his daughter's age, strength, and discretion to attempt to pass over it, then it was his duty to have removed it from such a position within a reasonable time."

Defendant does not except to this part of the

charge, but the complaint is that it was afterward so limited as to mislead the jury, as follows: "And if he failed to so remove it within such reasonable time, and his negligence thereby became the efficient and proximate cause of the injury, he would not be entitled to recover. But if the negligence of the plaintiff simply contributed to, or assisted in bringing about, the injury, without being its efficient cause, while the negligence of defendant remained as the efficient and controlling cause, in such case the contributory negligence of plaintiff would not defeat the action entirely, but must be considered by way of mitigating or lessening the damages."

We do not think there is any error in this charge as given, but that it is in accord with our decisions. See *Dush v. Fitzhugh*, 2 Lea, 307; *Whirley v. Whiteman*, 1 Head, 610; *Railroad v. Fain*, 12 Lea, 40; *Railroad v. Fleming*, 14 Lea, 135, and other cases.

Again, it is said the Court erred in the following charge: "In all cases where the negligence of two or more persons happens about the same time and place, and also where the negligence of the defendant, if any be proven, concurs in time and in place with some natural cause for which he could not be held responsible—such as, in this case, the wetting of the platform by rain—and it appears to your satisfaction, by a preponderance of the evidence, defendant's negligence so directly contributed to the accident that it is reasonably certain that the

other cause alone would not have been sufficient to produce it, the defendant would be liable."

We think there is no error in the charge thus given, and the trial Judge drew a proper distinction between the *cause of the fall* and the *proximate cause, of the injury*. This is well illustrated in the case of *Denning v. Cotton Compress Co.*, 6 Pickle, 353. In that case the rule is laid down as follows: "The proximate cause of an injury may, in general, be stated to be that act or omission which immediately causes, or fails to prevent, the injury—an act or omission occurring or concurring with another, which, had it not happened, the injury would not have been inflicted, notwithstanding the latter." In that case fire destroyed the cotton, and it was therefore said that it was the proximate cause of the loss; and the Court said: "It is true that the fire destroyed the cotton, and in that sense caused the loss, but it appears that, notwithstanding the occurrence of the fire, the cotton would not have been burned by it had not the breaking of the train while it was being removed happened, so that, but for this fact, the cotton would have been saved. This must therefore be held to be the proximate cause of the loss, and if it was the result of negligence, the carrier must answer for it."

It is again illustrated in the case of the *Railroad Company v. Kelly*, 7 Pickle, 705, where goods were consumed by a fire which was not the result of defendant's negligence; but the goods would never

have become exposed to the fire but for the negligent failure and refusal to deliver the goods on demand previous to the fire, so that, while the fire caused the loss, the failure to deliver caused the injury.

This charge of the Court is strictly in accord with the text-books and the decisions of other States. Shearman & Redfield on Negligence, Sec. 31 *et seq.*; Thompson on Negligence, 1085, Sec. 3; Bishop on Non-Contract Law, Secs. 39, 450, 452; Sutherland on Damages (2d Ed.), Sec. 16; *Crawfordsville v. Smith*, 41 Am. Rep., 612; *Atlanta v. Wilson*, 27 Am. Rep., 396; *Campbell v. Stillwater*, 50 Am. Rep., 567; *Hey v. Philadelphia*, 22 Am. Rep., 733; *Baldwin v. Turnpike Co.*, 16 Am. Rep., 33; *Cohen v. New York*, 4 L. R. A., 406.

A familiar illustration is the fall of a person upon an ice-covered pavement into an open cellar. In such case the ice is the cause of the fall, but the open cellar may cause an injury which, but for it, would not have occurred.

We do not deem it necessary to notice in detail the specific requests asked. The charge was full and fair, and more favorable to defendant than it could expect.

The question was fairly left to the jury to determine whether the young lady, in consequence of the pole, was compelled to make a higher, longer, or different step than she would have made if the pole had not been there, and whether or not it contributed directly to the fall.

Under the view we have taken, the company would be liable even if this were not so, if its negligence made the injury greater than it would have been in the absence of the pole, and whether the fall was occasioned alone by the slippery condition of the platform or by the presence of the pole, or both. But for the presence of the pole, the fall, if it had occurred, would probably have been attended with no serious injury.

In this view of the case, it is useless to consider the testimony in detail, as there is abundant evidence to sustain the verdict.

No complaint is made of the amount of the verdict. Nor could there be any just ground for complaint, as it appears that plaintiff has already paid out more than one-half the recovery in the satisfaction of doctors' bills and wages to nurses, besides losing the services of an industrious daughter.

We see no error in the judgment of the Court below, and it is affirmed with costs.

Moulton v. Connell-Hall-McLester Co.

MOULTON v. CONNELL-HALL-McLESTER COMPANY.

(Nashville. January 30, 1894.)

1. CORPORATIONS. *Suit by creditor to recover outstanding corporate assets.*

A few, less than all, of the creditors of an insolvent corporation, that has made a general assignment, cannot maintain suit to recover an outstanding asset of the company for their exclusive benefit, or at all, unless the assignee has refused, upon proper request, to bring the suit. (*Post*, pp. 381-385.)

Case cited: *Wallace v. Bank*, 89 Tenn., 530.

2. SAME. *Enforcement of director's statutory liability.*

The statutory liability of directors for debts of the corporation, contracted, with their consent, in excess of the amount of the capital stock paid in, cannot be enforced by the suit of a few, less than all, of the creditors of the corporation, whose debts have been thus created, but must be recovered by suit brought by all, or by some on behalf of all, of the creditors for whose debts the directors of the company have rendered themselves liable. (*Post*, pp. 385-388.)

Cases cited: 93 U. S., 231; 20 Wall., 520; 113 U. S., 302.

3. SAME. *Directors' statutory liability. Assent.*

The facts of this case do not show such assent of the directors to the creation of debts by the corporation in excess of its paid-up capital stock, as is requisite to fix upon them the statutory liability under that clause of the company's charter providing: "If the indebtedness of such company shall, at any time, exceed its capital stock paid in, the directors assenting thereto shall be individually liable to creditors for such excess." (*Post*, pp. 378-381, 385, 386.)

Act construed: Acts 1875, Ch. 142, § 11.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County. ANDREW ALLISON, Ch.

Moulton v. Connell-Hall-McLester Co.

The undisputed indebtedness of the Connell-Hall-McLester Company, as a corporation, to the complainants, is as follows: To C. H. Moulton, \$1,402.89; to Eaton, Stetson & Co., \$5,561.23; to C. B. Lancaster & Co., \$1,590.72; to J. W. Walcott, \$3,521.90.

These debts consisted of amounts due to the respective complainants on running accounts, incurred by said company in the purchase of goods, from time to time, in the operation of its mercantile business. These accounts accrued in part before January 20, 1891, and in part after that date.

The complainants averred that their respective debts were incurred by said company in excess of its paid-up capital stock of \$250,000, and that its directors, the defendants, C. W. McLester, L. W. Hall, A. P. Connell, J. T. Benson, J. M. Williams, W. A. Connell, and L. T. Armstrong, had assented to said indebtedness with knowledge that the company was indebted in excess of its paid-up capital stock, and that they were, therefore, personally liable for said debts, under that clause of the company's charter providing that "if the indebtedness of such company shall at any time exceed the capital stock paid in, the directors assenting thereto shall be individually liable to the creditors for such excess."

The individual defendants admitted themselves directors, but denied, by sworn answer, that they had assented to the creation of said indebtedness

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with knowledge that it exceeded the "capital stock paid in."

The entire evidence upon this aspect of the case consisted of stipulations of counsel, which are as follows:

"In this cause it is agreed that on January 20, 1891, the president of the Connell-Hall-McLester Company submitted to the stockholders of the company, at their annual meeting, the following report of the condition of the company, which was spread on the minutes:

ASSETS.	
Real estate	\$ 136,137 28
Due on wholesale accounts	\$ 210,489 05
Due on retail accounts	40,982 79
Due on sundry accounts	1,575 10— 253,046 94
Bills receivable	8,436 80
Furniture and fixtures	12,986 36
Cash on hand and in bank	7,185 78
Taxes account	298 35
Earned interest	1,059 66
Prepaid interest	754 52
Prepaid insurance	1,745 14
Stock on hand, per inventory	286,244 27
Team account	768 40
Total	\$ 708,663 50

LIABILITIES.	
Capital stock	\$ 239,269 14
Purchase account, Eastern bills	259,531 74
Bills payable	102,434 89
Bills payable on real estate, due 1892	10,000 00
Mortgage payable on real estate	50,000 00
Due employes, and sundry other accounts on fixtures, etc.	9,894 12
Guarantee account	6,751 28
Profits for 1890	30,782 33
Total	\$ 708,663 50

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"After the report the company continued to buy and sell goods, etc., until the time of its assignment, without protest or objection by defendants to such continuation of the business.

"It is further agreed that the by-laws of the Connell-Hall-McLester Company provided 'that there shall be an executive committee, composed of the president, first and second vice-presidents, who shall have control of the business of the company in all its details, under the general direction of the board of directors.'

"C. W. McLester was the president of the company from January 7, 1890, to January 20, 1891, and, during the same time, L. W. Hall was first vice-president, and A. P. Connell second vice-president.

"On January 20, 1891, A. P. Connell became president, and L. W. Hall first vice-president, and remained such until the company assigned. After January 20, 1891, the position of second vice-president was vacant, and there were only two members of the executive committee.

"It is further agreed that the Connell-Hall-McLester Company, on the fourth day of June, 1891, made a general assignment to the Nashville Trust Company of all its property of every kind, including choses in action, rights and privileges of every nature and kind, for the equal and *pro rata* benefit of all its creditors.

"And it is further agreed that on the first day of January, 1891, the liabilities of the Connell-

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Hall-McLester Company exceeded the total amount of the paid-up capital stock of the company, and that the liabilities of the company continuously exceeded the paid-up capital stock of the company from the first of January, 1891, until the company made its assignment in June, 1891. It is further agreed that, at the time the goods for the price of which complainants claim a debt against the said Connell-Hall-McLester Company were shipped and delivered to said company, its indebtedness exceeded the amount of its paid-up capital. It is admitted that the goods the price of which is sued for, were received from complainants by the Connell-Hall-McLester Company."

H. E. JONES for Complainants.

E. H. EAST, J. C. McREYNOLDS, and CHAMPION,
HEAD & BROWN for Defendants.

McALISTER, J. The bill in this case is filed by certain creditors against the Connell-Hall-McLester Company, the Nashville Trust Company, its assignee, and against certain directors of said insolvent corporation. The bill is filed in a two-fold view, viz.: First, it alleges that certain directors of the Connell-Hall-McLester Company, after said corporation had made an assignment to the Nashville Trust Company for the benefit of its creditors, bought up, at a discount, debts against said insolvent company, and the bill seeks to hold

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these directors liable as trustees for the corporation in such purchases, and to subject profits made in this way to the direct payment of complainants' debts. The more specific allegations of the bill are, viz.: That the Connell-Hall-McLester Company was a corporation under the laws of Tennessee, with a capital stock of \$250,000; that said company did a mercantile business in Nashville, bought goods of complainants, and, in 1891, made a general assignment to the Nashville Trust Company; that the assignee has made a printed statement to creditors, showing that the liabilities of the company largely exceeded its assets. It is then charged that the defendant, Hall, acting for himself and other directors, after the assignment, went East, and made such representations to many creditors of the company as induced them to sell to him their claims at fifty cents on the dollar. It is charged that Hall made these representations knowing the Nashville Trust Company, as assignee, had on hand enough funds to pay more than fifty cents on the dollar on said claims, and that, a short time after the deal, the trust company did pay on the indebtedness of the Connell-Hall-McLester Company sixty-five cents on the dollar, leaving assets still on hand.

Complainants further charge that, after the assignment of the company to the Nashville Trust Company, defendant Hall and his associates, former directors in said company, were left in charge of the business, and carried on the business as em-

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ployes of the assignee, and that, while so acting, effected the compromise or purchase of the debts already mentioned. Complainants charge that Hall and associates paid for the claims so bought by them "either directly with money drawn from the assignee of said company on said debts, or made a temporary arrangement by which the money to pay said debts was advanced to them, on the representation that there was money or assets already in the hands of the assignee of said company, or soon would be, to pay fifty cents on the dollar; and said money, if borrowed at all by said Hall and his associates in said deal, was borrowed on the faith of assets of the said Connell-Hall-McLester Company in the hands of the assignee for the benefit of creditors, and was repaid by funds drawn from said assignee. In any event," continues the bill, "said assets were the basis of the transaction, and the creditors who have not been settled with are entitled to any profit made."

This bill, it will be perceived, is not filed in the name of the assignee, nor for the benefit of all creditors, but is the suit of individual creditors. Complainants pray for a decree for their debts against the company and the defendant directors; that the Nashville Trust Company be held responsible to complainants for any sums paid Hall and associates on such claims in excess of the amount actually paid therefor, and that any funds in the hands of the Nashville Trust Company due to Hall and associates on claims purchased by

them be paid to complainants in satisfaction of their debts against the company.

To the bill, as amended, the Nashville Trust Company and the directors demurred. The Chancellor sustained the demurrer, and, in respect to this branch of the case, dismissed the bill. This action is assigned as error.

Without undertaking to pass upon all the grounds of demurrer, we are clearly of opinion the action of the Chancellor was correct, and should be sustained upon the second and fourth assignments, which are as follows, to wit:

“*Second.*—Complainants seek to have profits alleged to have been made, or which will be made, by defendant directors, by purchasing claims against the Connell-Hall-McLester Company at a discount, applied to the payment of their debts, and not to have the same declared a part of the corporate assets. The law will not permit them to adopt this course, nor can they have such a remedy.”

The fourth ground of demurrer is that “complainants have no right to prosecute this suit, because they do not show that the Connell-Hall-McLester Company or its assignee has been requested to proceed against these directors to recover any profits made by them for the benefit of the corporation or its creditors.”

It was held by this Court, in the case of *Wallace v. Lincoln Savings Bank*, 5 Pickle, that “no single creditor can appropriate to the payment of his own debt assets properly belonging to an in-

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solvent corporation, and no suit can be maintained by a creditor to recover equitable assets for the company unless the company or its assignee has been requested to institute suit, and has wrongfully refused." No such allegation is made, and its omission is fatal to the right of complainants to maintain this bill.

It is sought, in the other aspect of this bill, to hold defendant directors liable, for the reason that the Connell-Hall-McLester Company was a manufacturing corporation, and these defendants contracted the debts due the complainants, knowing them to be in excess of the capital stock. It is charged in the bill that defendant is a corporation, chartered under the laws of the State as a *manufacturing* corporation, with a capital stock of \$250,000, and carried on a manufacturing and mercantile business. Complainants charge that their respective debts were incurred by the Connell-Hall-McLester Company in excess of its capital stock, and that the defendant directors incurred said debts with the knowledge that, at the time, the said company was indebted to the full extent of its capital stock. The charter of the company provided that "if the indebtedness of such company shall at any time exceed the capital stock paid in, the directors assenting thereto shall be individually liable to the creditors for such excess."

After some other pleadings, which it is not necessary to mention, answers were filed by all the individual director defendants, in which they deny

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all the allegations of the bill under oath, the oath not having been waived in the bill. The defendants especially denied that they ever assented to the creation of complainants' debts, knowing them to be in excess of the capital stock of the company, and emphatically denying that the Connell-Hall-McLester Company was a manufacturing corporation, or ever so regarded.

The case went to proof. The Chancellor, upon final hearing, decreed that the equities of the bill are denied in the answer, and are not sustained by the proof. It is stated by counsel for appellant that the ruling of the Court was based upon the finding that the proof failed to show that any of the directors sued as defendants assented to the purchase of the goods after it was known that the liabilities exceeded the capital stock paid in.

We are of opinion, upon an examination of the record, that the proof is insufficient to warrant the contention of complainants that these directors assented to the creation of these debts, and that the decree of the Chancellor is correct. In addition to this, it is a conclusive answer to such relief that the bill was not properly framed. As has already been observed, this is a proceeding by individual creditors in their own behalf, without the intervention of the corporation, the assignee, or the other creditors. This clause in our general incorporating act is almost identical with that of Congress regulating the creation of corporations in the District of Columbia. That Act has been

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construed by the Supreme Court of the United States, the Court using this language:

“Nor can we believe that an act intended for the benefit of the creditors generally, where the bank proves insolvent, can be justly construed in such a manner that any one creditor can appropriate the whole or any part of this liability of the trustees to his own benefit, to the possible exclusion of all or of any part of the other creditors. But such may, and probably would, often be the result if any one creditor could sue alone while there were others unsecured. We are of opinion,” continues the Court, “the fair and reasonable construction of the Act is that the trustees who assent to an increase of the indebtedness of the corporation beyond its capital stock are to be held guilty of a violation of their trust; that Congress intended that, so far as this excess of indebtedness over capital stock was necessary, they should make good the debts of creditors who had been the sufferers by their breach of trust; that the liability constitutes a fund for the benefit of all creditors who are entitled to share in it, in proportion to the amount of their debts. The remedy for this violation of duty as trustees is, in its nature, appropriate to a Court of Chancery. The powers and instrumentalities of that Court enable it to ascertain the excess of the indebtedness over the capital stock, the amount of this indebtedness which each trustee may have assented to, and the extent to which the funds of the cor-

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poration may be resorted to for the payment of debts; also the number and names of the creditors, the amount of their several debts, to determine the sum to be received of the trustee and apportioned among the creditors, etc. This course avoids the injustice of many suits against the defendants for the same liability, and the greater injustice of permitting one creditor to absorb all or a very unequal portion of the sum for which the trustees are liable, and it adjusts the rights of all concerned on the equitable principles which lie at the foundation of the statute. One creditor cannot sue alone, but must either join the other creditors or bring his suit in behalf of himself and all other creditors; and, while the case is considered in reference to remedies afforded by the statute, it is placed on the solid ground that the fund, by the statute, consists of the excess of all debts over the capital, and that there are various parties having several and unequal claims against the fund exceed it in amount." *Horner v. Henning*, 93 U. S., 231. See also *Pollard v. Bailey*, 20 Wall., 520; *Stone v. Chisolm*, 113 U. S., 302.

So that, all other questions out of the way, it is plain the present bill cannot be maintained, because it appears that the whole frame-work of the bill is designed to subject to the payment of complainants' individual debt a fund which is created by the statute for the benefit of all the creditors whose debts were created, with the assent of the directors, in excess of the capital stock paid in.

The liability of the directors under the charter is solely for the excess of indebtedness, and to the creditors of the company whose debts were created in violation of law, one or two or three of whom cannot maintain an action for their individual debts.

There is no error in the decree of the Chancellor, and it is affirmed.

Jordan v. Everett and Claiborne v. Everett.

JORDAN v. EVERETT and CLAIBORNE v. EVERETT.

(Nashville. February 6, 1894.)

1. SEPARATE ESTATE. *Priority of creditors' liens thereon.*

Between creditors of a married woman whose several debts constitute charges upon her separate estate, that one secures the first lien, and is entitled to priority of satisfaction, whose suit in equity for enforcement of his charge is first perfected into a *lis pendens*. (*Post*, pp. 391-395.)

Cases cited and approved: *Petway v. Hoskins*, 12 Lea, 107; *Tharpe v. Dunlap*, 4 Heis., 685.

2. SAME. *Jurisdiction of Chancery Courts over.*

The jurisdiction of Chancery Courts to enforce payment of debts charged upon a married woman's separate estate is inherent and exclusive. It has not been changed by statute. (*Post*, pp. 394, 395.)

Code construed: §§ 5022, 5026-5030 (M. & V.); §§ 4279, 4283-4287 (T. & S.); *Graham v. Merrill*, 5 Cold., 632; *Cowan v. Dunn*, 1 Lea, 68; *Brooks v. Gibson*, 7 Lea, 271; *Jordan v. Keeble*, 85 Tenn., 416; *Warren v. Freeman*, 85 Tenn., 513; *Eckerly v. McGhee*, 85 Tenn., 661.

3. SAME. *Pleadings.*

And the creditor ripens his charge upon the separate estate into a fixed lien thereon, and becomes entitled to priority of payment, by filing his bill and securing issuance and service of process, although he had not previously obtained judgment upon his debt, and did not make affidavit to his bill, and did not seek or obtain attachment or injunction thereunder. (*Post*, pp. 395, 396.)

Cases cited and approved: *Petway v. Hoskins*, 12 Lea, 107; *Brooks v. Gibson*, 7 Lea, 271; *Cowan v. Dunn*, 1 Lea, 68; *Shelton v. Johnson*, 4 Sneed, 680; *White v. Railroad*, 7 Heis., 519; *Roberts v. Francis*, 2 Heis., 133; *Tharpe v. Dunlap*, 4 Heis., 685; *Jordan v. Keeble*, 85 Tenn., 416.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
ANDREW ALLISON, Ch.

Jordan v. Everett and Claiborne v. Everett.

J. M. ANDERSON for Jordan.

J. B. DANIEL for Claiborne.

WILKES, J. Thomas H. Everett and wife, Mary L. Everett, executed a note to Mrs. Julia M. Jordan June 16, 1890. Afterwards, October 2, 1890, May 5, 1891, and June 16, 1891, they executed other notes to A. S. Claiborne. July 14, 1891, they executed still another note to A. S. Claiborne, agent.

Mary L. Everett, wife of Thomas H. Everett, owned a separate estate, consisting of houses and lots in Nashville, and in each of the several notes executed by her she charged her separate estate with its payment.

Both before and after these notes were executed Thomas H. Everett joined with his wife, Mary L., in several mortgages and deeds of trust upon the property in which Mary L. had a separate estate.

On September 30, 1891, Mrs. Julia M. Jordan filed her bill in the Chancery Court, at Nashville, against Thomas H. Everett and wife, Mary L., and others, alleging the execution of the notes to her, and that it was a charge upon the separate estate of Mrs. Everett, setting out the real estate by specific description; alleging also that it was incumbered by mortgages and deeds of trust, and that, in consequence of these mortgages, Mrs. Everett had only an equitable interest remaining in her, and charging that, by the execution of the note

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by Mrs. Everett, charging her separate estate for its payment, she created a lien upon such separate estate, and seeking to subject the interest of Mrs. Everett in the separate property to the satisfaction of the note.

No judgment had been rendered on the note in favor of Mrs. Jordan, no fraud was charged upon the part of Everett and wife, no attachment or injunction was prayed for, and the bill was not sworn to.

Subsequent to the filing of this bill by Mrs. Jordan, and on October 7, 1891, and October 12, 1891, A. S. Claiborne and A. S. Claiborne, agent, filed two bills in the same Court against the same parties, alleging the execution to him by Everett and wife of the notes, as before stated; that suit had been brought, and judgments obtained upon them against Everett and wife before a Justice of the Peace; that executions had been issued upon the judgments, and had been returned *nulla bona*. These bills also alleged that Everett and his wife had become insolvent, and that they were fraudulently disposing of their property. The bills were sworn to, and an injunction was prayed, granted, and issued in each case.

No serious defense was made by the Everetts to either suit, and final decrees and order of sale was had in each, the decrees in favor of Claiborne being rendered April 30, 1892, and in favor of Mrs. Jordan, June 20, 1892.

The real estate was sold, and, by agreement,

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\$1,000 of Union Mills stock and the note of Hamilton Parks, purchaser, for \$2,145 was substituted for the real estate, and are held under the orders of the Chancery Court, and, by consent of all parties interested, in lieu of such real estate, and subject to all the liens and equities existing against the real estate.

The causes were all consolidated, so as to raise and determine the question of priority between Mrs. Jordan and A. S. Claiborne as to this fund, and, on the hearing, the Chancellor held that Mrs. Jordan had a prior lien, and was entitled to be first paid, and Claiborne appealed, and has assigned the following error: "That the Court erred in holding this lien of Mrs. Jordan prior in point of time to that acquired by Claiborne, and in ordering her debt to be first paid, because Claiborne was a judgment creditor of the Everetts, and Mrs. Jordan was not; Claiborne's bill alleged fraud, and Mrs. Jordan's did not; Claiborne asked for and obtained injunction, and Mrs. Jordan did not; Claiborne's decree for sale was obtained some fifty days before Mrs. Jordan's, and, because Mrs. Jordan's suit was not of such a character as to create a lien by *lis pendens*."

Claiborne's bills are filed under §§ 5026 to 5030, inclusive, of the Code (M. & V. compilation), and on the theory that these sections provide an exclusive remedy for the enforcement of debts of this character, and, inasmuch as his bills conform to the requirements of these sections, and Mrs.

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Jordan's bill does not so conform, he is entitled to have priority, and that Mrs. Jordan obtained no right to priority by first filing her bill, if, indeed, she acquired any lien whatever.

The Act of 1832, from which these sections (5026 to 5030) had their origin, was not intended to abridge or curtail in any way the original jurisdiction of the Chancery Court, as it then existed, but its object was to enlarge and extend the power and jurisdiction of that Court to subject equitable interests that, prior to that time, had been exempt.

The article in which they are found relates to the exclusive jurisdiction of the Chancery Court, and the first section of this article reads as follows: "The Chancery Court shall continue to have all the powers, privileges, and jurisdiction properly and rightfully incident to a Court of Equity by existing laws." M. & V. Code, § 5022. See, also, *Graham v. Merrill*, 5 Cold., 632; *Conan v. Dunn*, 1 Lea, 68; *Brooks v. Gibson*, 7 Lea, 271.

When Mrs. Everett signed the notes in controversy, she created, in each instance, a charge against her separate estate, which could be enforced against such separate estate, but it in no way enlarged her personal liability for the debt. The property itself was made the debtor, and not the married woman personally. This charge against her separate estate could only be enforced against it by suit in chancery, and not by judgment and execution at law. *Jordan v. Keeble*, 1 Pickle, 416;

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Warren v. Freeman, 1 Pickle, 513; *Eckerly v. McGee*, 1 Pickle, 661.

The mere execution of the note, binding the separate estate, did not create a lien, but only a charge, upon such separate estate, and there is no priority, as between these charges, depending upon and fixed by the date when the notes were executed, nor is such charge in any way aided by the recovery of a judgment at law upon the note.

A lien is, however, fixed upon such separate estate, and any equitable interest therein, whenever a proper bill is filed in the Chancery Court to subject such separate estate, legal or equitable, to the payment and satisfaction of such note, provided the separate estate sought to be charged is set out and described by proper designation and description.

In the case at bar, summons to answer was sued out the same day the bill was filed, and was duly executed, and the lien dates from the filing of the bill and suing out of the summons.

The proceeding is in the nature of a proceeding *in rem* to subject the specific property mentioned in the bill to the payment of the debt sued on, and is notice to the world of these facts, and creates a lien *lis pendens*.

In such case, no affidavit to the bill, no judgment at law, no attachment or injunction, are necessary to fix the lien. *Petway v. Haskins*, 12 Lea, 107; *Brooks v. Gibson*, 7 Lea, 271; *Cowan v. Dunn*, 1 Lea, 68; *Shelton v. Johnson*, 4 Sneed,

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680; *White v. N. & N. W. R. R.*, 7 Heis., 519; *Roberts v. Francis*, 2 Heis., 133; *Tharp v. Dunlap*, 4 Heis., 685; *Jordan v. Keeble*, 1 Pickle, 416; Bennett on Lis Pendens, Sec. 142; 2 Pomroy's Equity, Sec. 635; 4 King's Digest, Secs. 7885, 3.

While all the notes executed by Mrs. Everett in controversy in this cause created charges upon her separate estate, none of them created any lien by its execution or by the rendition of judgment upon it.

Mrs. Jordan, by filing her bill and taking out summons, acquired a lien upon the separate estate of Mrs. Everett. So likewise did Claiborne, but the lien of the latter stands upon the same basis as that of the former, and his attachment, injunction, and judgment at law gave him no prior right or superior equity. The question is simply one of diligence among creditors having equal rights, and the familiar maxim, "First in time, first in right," applies. *Petway v. Haskins*, 12 Lea, 107; *Tharp v. Dunlap*, 4 Heis., 685.

The decree of the Chancellor is correct, and is affirmed, and the cause is remanded to be further proceeded in. The costs of the appeal will be paid by Claiborne, individually and as agent.

STEEDMAN, STEERE & CO. v. DOBBINS & DAZEY.

(Nashville. February 6, 1894.)

I. ASSIGNMENTS, GENERAL. *What is not.*

From the face of the conveyance alone it must be determined whether or not an instrument constitutes a general assignment within the meaning of Acts 1881, Ch. 121. Hence, an instrument which does not, upon its face, purport to be a general assignment, and does not comply, nor purport to comply, with said Act, but, on the contrary, creates preferences and omits schedules, cannot be converted into a general assignment by parol proof that it embraced all the maker's property, and then set aside as illegal and void for failure to comply with the Act. Such instrument does not fall within said Act, and is valid as a special assignment. (*Post*, pp. 398-405.)

Acts construed: Acts 1881, Ch. 121.

Cases cited and approved: *Belding Bros. v. Frankland*, 8 Lea, 67; *Ordway v. Montgomery*, 10 Lea, 515-520; *Cowan, McClurg & Co. v. Gill*, 11 Lea, 675; *Hays v. Covington*, 16 Lea, 262; *Hill, Fontaine & Co. v. Alexander Bros.*, 16 Lea, 496; *Rosenbaum v. Miller*, 85 Tenn., 653; *Lookout Bank v. Noe*, 86 Tenn., 21; *Scheibler v. Mundinger*, 86 Tenn., 674; *Kinsey & Franklin v. Wakely*, MS. (1877); *Orr, Jackson & Co. v. Buchanan*, MS. (1889); *Morrow v. Hughes*, MS.; *Lemon, Hale & Co. v. Johnson*, MS. (1893).

2. STARE DECISIS. *Example.*

Acts of 1881, Ch. 121, relating to general assignments, having through a period of thirteen years been uniformly construed, by repeated decisions of this Court, to require that the instrument shall disclose its character upon its face, and that construction having been acquiesced in by the Legislature and acted upon by the legal profession and the business public, it will not be changed, in the absence of the most urgent reasons and convincing evidence that more good than evil would result from the change. (*Post*, pp. 405, 406.)

3. CONSTRUCTION. *Of Acts 1881, Ch. 121, strict.*

It is settled that Acts 1881, Ch. 121, must be strictly construed. (*Post*, p. 407.)

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Cases cited and approved: Hill, Fontaine & Co. v. Alexander, 16 Lea, 496; Lookout Bank v. Noe, 86 Tenn., 26; Scheibler v. Munding, 86 Tenn., 674.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
ANDREW ALLISON, Ch.

JOHN ALLISON for Complainants.

VERTREES & VERTREES and SMITH & DICKINSON
for Defendants.

WILKES, J. This is a creditor's bill to set aside an assignment made by Dobbins & Dazey to J. M. Dickinson, trustee, on the ground that it is fraudulent and invalid under the Act of 1881, Ch. 121.

Defendants demurred to the bill, and, their demurrer being overruled, they excepted and appealed to this Court, and assigned errors.

The case has been very elaborately and ably presented, and the question involved is of general interest and great importance.

Briefly stated, the question presented is, whether an assignment or deed of trust that does not comply with, or purport to comply with, the provisions of the Act mentioned can be shown by evidence *dehors* the conveyance to be a conveyance of all the debtor's property, and hence void and illegal.

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because it does not comply with the requirements of that Act.

It is insisted that while this conveyance does not comply with the provisions of the Act, inasmuch as it gives preferences among creditors, and has no such schedules as that Act requires, and does not upon its face purport to be a general assignment under that Act, still that it does, as a matter of fact, convey all the debtor's property, and that this fact may be shown *dehors* the instrument by competent evidence, and that the result must be to render the assignment void, first, for want of compliance with the Act, and, second, because it is a fraudulent evasion of the Act. On the other hand, it is insisted that the conveyance is not a general assignment under that Act, and that the Court cannot look beyond the face of the instrument to determine this question.

The Act of 1881, Ch. 121, was approved April 6, 1881, and went into effect at that date. It came before this Court for the first time at the December term, 1881, in the case of *Belding Bros. & Co. v. J. Frankland, Trustee*, 8 Lea, 67, when the extraordinary character of the Act was referred to in the opinion of the Court, delivered by Judge Cooper, as follows:

"If property be not embraced in the assignment, it is obvious that it cannot pass to the assignee by virtue of the instrument. Certainly, as to real estate, the title to which must be conveyed by instrument in writing, containing a suffi-

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cient description to identify it, and the conveyance of which must be registered to be good against creditors and *bona fide* purchasers for value, *there will be some difficulty in carrying out the legislative intent disclosed by the Act.* There will be less difficulty as to personalty, where neither writing nor registration is essential, for the statute may be treated as in the nature of a bankrupt or insolvent law. In that view the assignment would be an act of bankruptcy, and the title to the property would pass by operation of law. The argument submitted makes no objection to the efficiency of the Act to this extent, but takes it for granted. We shall act upon the concession in this case without deciding the question."

It came up again in the case of *Ordway, McGuire & Co. v. Montgomery*, 10 Lea, 515, 520, at the December term, 1882, and in that case the Court, through Judge Cooper, said:

"The object of the statute, expressed in its title as well as in the section quoted, was to prevent a failing debtor from giving a preference to particular creditors by a conveyance of his property for their benefit. It, therefore, invalidates a general assignment giving preferences only to the extent of such preferences, and avoids altogether any mortgage, deed in trust, or other conveyance of a portion of a debtor's property for the benefit of any particular creditor. But it does not in terms, like the bankrupt law of the United States, extend to any payment, sale, or other disposition,

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absolutely or conditionally, of the debtor's property."

In this case, there was a vigorous dissent by Judge Freeman, who took the broad position that the purpose of the Act was to prevent all preferences, and make an equal *pro rata* distribution of the debtor's property no matter what preferences he might make, nor what plans or means or forms of conveyance he might adopt. He stated very plainly that the effect of the opinion was, that a failing debtor might *appropriate all his property piece by piece or in gross* to any favored creditor or creditors, and leave the others nothing, thus practically rendering the statute nugatory, and that there would be no case where a preference might not be given to the extent of the entire property of the debtor, if an agreement could be reached as to price. He adds: "I cannot agree that this is the proper construction or meaning of the statute, because it will, in practice, defeat its operation entirely, except at the option of the debtor and favored creditor."

The line was thus sharply drawn between the two constructions as early as 1882.

The statute was next considered in *Cowan, McClung & Co. v. Gill*, 11 Lea, 675, upon a point not now material to be considered.

In *Hays v. Covington*, 16 Lea, 262, it was again considered, the opinion of the Court being again delivered by Judge Cooper. In this case, the conveyance did not purport to be a general assign-

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ment of all the debtor's property, and it was shown by proof that it did not embrace a tract of land upon which the deb'or lived. There was no schedule of property attached to the conveyance. Soon after its execution, the creditors who were provided for by it, obtained judgments before a Justice of the Peace, and caused executions to issue and be levied on this tract of land upon which the debtor lived, and which was not embraced in the deed of trust, and were proceeding to condemn and sell the land, when they were enjoined by the trustee, on the ground that, though not referred to or described in the deed of trust, yet the tract of land, nevertheless, passed to the trustee by operation of the Act.

The Chancellor so held, and the Referees reported in favor of an affirmance of the Chancellor's decree, and the creditors excepted. It was held by this Court that, to constitute a general assignment under the Act, it must appear from the face of the conveyance, or the sworn inventory attached, that it was a general assignment of all the debtor's property, and if it did not, on its face, purport to be a general assignment, it would not be held to be a general assignment under that Act, but only a partial assignment, and, hence, could not have the scope and effect given by that Act, nor would it be governed by the rules laid down in that Act for such general assignments. This decision was rendered at the April term, 1886, at Jackson.

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It was followed by the case of *Hill, Fontaine & Co. v. Alexander Bros.*, 16 Lea, 496, at the same term of the Court, opinion by Judge Turney, in which it was held that the requirement of a schedule by the Act was mandatory, and that the conveyance would be fraudulent and void in the absence of a sufficient schedule properly verified.

The next case was that of *Rosenbaum v. Miller*, 1 Pickle, 653, opinion by Judge Fowlkes, in which the question of inefficiency of description of the property conveyed was considered.

This was followed by the case of *Lookout Bank v. Noe*, 2 Pickle, 21, opinion by Judge Caldwell, in which it was again held that the provision of the statute in regard to a full and complete inventory or schedule, under oath, of all the debtor's property, was mandatory, and a strict compliance with the statute was absolutely essential to the validity of the assignment. The form and substance of the affidavit was considered, and the cases of *Hill, Fontaine & Co. v. Alexander Bros.* and *Rosenbaum v. Miller* were affirmed. It was held that an assignment must be treated as a general assignment when it appeared, from its language and the manner of its execution, that it was so intended, and when it was so treated by all parties, although it did not, in express terms, purport to convey all the debtor's property.

This was followed by the case of *Scheibler v. Mundinger*, 2 Pickle, 674-695, decided at the April term, 1888, opinion of the Court being delivered

by Special Judge M. M. Neil, in which it was said the statute did not intend to introduce any new legal instrument, but simply to regulate an old one heretofore in use; that the general assignment defined and recognized by the Act of 1881, Ch. 121, is an assignment of all a debtor's property for the benefit of creditors; that the character of the instrument must be ascertained from its face alone; that the requirement of a sworn schedule was mandatory; that great particularity of description was demanded, and an insufficient description in the schedule would not be remedied by the provision of the Act extending the deed to other property, nor by an offer in the schedule to furnish more full and particular description of the property if required, and laying down rules with illustrations as to description to be given of goods, choses in action, and other property.

This is, briefly, the law as it appears in our books, but we have several unreported cases bearing directly upon the points involved.

In the case of *Kinsey & Franklin v. Wakely*, decided December term, 1877, from Davidson County, it appeared that, as a matter of fact, all the debtor's property was conveyed, but the deed did not purport on its face to do so, and, the question being directly raised, it was held that, as the deed did not purport on its face to convey all the debtor's property, nor to secure all his debts, it was not a general assignment under the Act of 1881. The same was held in *Orr, Jackson & Co.*

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v. *Buchanan*, December term, 1889, from Marshall County; and in the case of *Morrow v. Hughes*, from Maury County, at the same term; and, again, in the case of *Lemon, Hale & Co. v. A. Hill Johnson*, at Jackson, April term, 1893.

We have thus an unbroken chain of decisions for thirteen years, holding that the character of the instrument must be determined from its face, and that the Court will not look outside the four corners of the instrument to determine whether or not it is a general assignment under the Act of 1881.

This construction placed upon the Act, has been acquiesced in by the profession, and acted upon by the business men of the State, until it has, more or less, entered into all transfers and assignments, and the Legislature has not seen proper, during this time, to make any further or different legislation upon the subject.

The nice distinctions, many of them founded on reason and authority, made by learned counsel for complainants as to the differences between general assignments and mortgages and deeds of trust, were evidently not in the minds of the law-makers when they passed the Act, nor have they been applied by the Court in construing it. It might, perhaps, have been best to confine the Act to the technical case of a general assignment, as complainants' counsel contends, but it has not been so done. It is certain that since the Act, as before, deeds of trust, mortgages, pledges, and sales may

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be made by the debtor preferring one creditor over another, and this may extend to a portion or all the debtor's property, and they will be held good even though this may seem to contravene the general purpose of the Act to make an equal *pro rata* distribution. But our Courts have held that, to bring an assignment under the Act of 1881, it must purport to be under that Act upon its face, either directly or by fair inference, and it cannot look beyond the instrument to determine whether it is or is not a general assignment of all the debtor's property. If this construction of the Courts defeated the purpose of the Legislature, they could have remedied it by proper legislation. They have not seen proper to do so during the thirteen years which have elapsed since this construction was placed upon it, and, the profession and business public having accepted and acted upon it, we cannot now disturb it.

Certainty and stability in the holdings of this Court are of such importance, that it is only for the most urgent reasons that a rule so often laid down, and so universally accepted and acted upon, would be changed, and then only in the event the Court could see that more good than evil would result from the change.

To hold for complainants in this case would result in giving to them a preference of satisfaction out of the property conveyed directly contrary to the letter and spirit of the Act.

It will not be contended that the law makes it

obligatory upon the debtor to make a general assignment under the Act of 1881. It is a matter left to the option of the debtor, and if he refuses to come in under the Act, it cannot be treated as a fraud upon the Act. When there is no obligation to do any act, a failure to do it creates no liability.

It is certain that the Act of 1881, as contained in the statutes and construed by the Courts, gives the debtor a right to make a conveyance which, in its scope and effect, reaches far beyond the scope and power of the common law assignment, vesting in the assignee property not specifically described or conveyed, and uprooting conveyances and transfers which, but for it, would have been valid and good—a scope and effect never possessed by any other conveyance, and it is proper therefore that it should be strictly construed and held in close and proper limits, and this has been the ruling of our Courts whenever the Act has come before it for construction. *Hill, Fontaine & Co. v. Alexander*, 16 Lea, 496; *Lookout Bank v. Noe*, 2 Pickle, 26; *Scheibler v. Mundinger*, 2 Pickle, 674.

The logical result of the Act, as construed by the Court, is to place in the hands of the debtor an option to use the Act or not, as he may see fit; and, in this sense, it may appear to be intended more for his benefit than for his creditors, but, even if this be so, the general purpose of the act is still preserved to make a *pro rata* dis-

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tribution of all the debtor's property among all his creditors whenever the Act is followed.

While we are not disposed to go beyond what our Courts have already held in regard to this law, we are, at the same time, not disposed to disturb what has already been decided, even though better reasons may be given in either direction, and we, therefore, confine our ruling to the point that you cannot look beyond the instrument to ascertain whether, it is or is not a general assignment of all the debtor's property, under the provisions of the Act of 1881. Tested by this rule, the assignment made an exhibit to the bill in this cause, does not purport to be a general assignment of all the debtor's property, and does not purport to be under the Act of 1881; and, this being so, the Court must look alone to the instrument, no matter what the bill may allege; and, this being so, the demurrer should have been sustained by the Court below, so far as the bill seeks to avoid the conveyance.

The decree of the Chancellor is reversed and the bill dismissed as to the trustee, and the cause is remanded to the Court below, where complainants may, if they choose, proceed to judgment against defendants, Dobbins & Dazey.

Complainants will pay the costs of appeal.

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*KIRKPATRICK v. PURYEAR.

(Nashville. February 6, 1894.)

1. PAYMENT. *By check.*

The indorsement of the check of another to a creditor, in settlement of notes and an account, accompanied by a surrender of the notes and a receipt in full of the account, will be regarded as payment, in the absence of any agreement to the contrary. (*Post*, pp. 410-413.)

Cases cited: *Springfield v. Green*, 7 Bax., 301; 75 Va., 726; 86 Va.

2. BILLS AND NOTES. *Release of indorser of check.*

The indorser of a check is released by failure, for several days, to present it at a bank in the same place, during which the bank fails and the collection of the check is rendered impossible, when there was a deposit out of which it would have been paid if promptly presented. (*Post*, pp. 414, 415.)

Cases cited and approved: *Bank v. Merritt*, 7 Heis., 193; *Schoolfield v. Moon*, 9 Heis., 173.

3. SAME. *Same. Burden of proof.*

The holder of a check has the burden of proving that the indorser was not injured by delay in presenting it until after the bank had failed, where the indorser has proved that it was not duly presented for payment; and this is the rule, whether the suit is brought on the check, or on an indebtedness to pay which the check was transferred and indorsed. (*Post*, pp. 415-421.)

Cases cited and approved: *Bank v. Merritt*, 7 Heis., 177; *Betterton v. Roope*, 3 Lea, 215.

Cited and distinguished: 38 N. Y., 289; 3 Lansing, 29; 43 N. Y., 171; 10 Wend., 304; 13 *Id.*, 549; 2 Hill, 425; 2 Black, 350; 43 Ohio St., 53.

* The effect of delay in presenting a check to release an indorser is the subject of annotation to the above case in 22 L. R. A., 785 —REPORTER.

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4. SAME. *Same. Extinguishment of original indebtedness.*

The extinguishment of the liability of an indorser of a check by failure to present it until after the bank has failed, extinguishes his liability also on an indebtedness for payment of which the check was indorsed. (*Post*, pp. 415-421.)

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County. ANDREW ALLISON, Ch.

SMITH & DICKINSON for Kirkpatrick.

STOKES & STOKES for Puryear.

SNODGRASS, J. This suit is brought by bill in chancery on an account for \$745, alleged to be due from defendant. The defense was by answer, averring payment, and exhibiting the receipt in full of the account sued on. The defendant further set up in defense that the payment was made by a check drawn in his favor by Sulzbacher Bros., and indorsed to the complainant. It was insisted that this check, which was indorsed June 19, 1891, had been accepted in payment of the account, but that, if only taken as a means of payment, the check was not presented until June 22, and until after the failure of the bank on which it was drawn—the Nashville Savings Bank—and that the negligence of the complainant in the presentment of

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the check had occasioned the loss, and that defendant was thereby discharged from liability on the original account. It was shown in proof that the account, which was for a little more than \$1,100, was made up, among other things, of two notes, aggregating about \$1,000. These notes—not due—had been charged into the account by direction of defendant's agent, and for the aggregate of something over \$1,100 a receipt in full had been taken, and these notes delivered up in connection with that receipt. Other proof was taken, and the case heard by the Chancellor, who dismissed the bill, and complainant appealed and assigned errors.

The first question to be determined is whether the indorsement of the check was done in payment of the indebtedness. The settlement of that question depends upon the intent of the parties, as evidenced by express agreement or the facts and circumstances of the transaction. The evidence on this subject is as follows: The member of the firm of Kirkpatrick & Co. with whom the transaction was had was asked:

"Please state whether or not you took the checks as in themselves a payment [there were other checks indorsed with this not necessary to be noticed] for the amount of the account, or how you took them."

Ans.—"I supposed that the bank drafts and the Sulzbacher check were good, and took them expecting they would be paid, and the money so

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realized would go in payment of Puryear's account and the cash I had advanced. I did not take them as a payment of the account, but only as a way of paying it, and for Puryear's convenience. If the checks were not paid, I, of course, did not expect the account would thereby be paid."

It is observed that he does not state what was said between them, nor deny what Puryear's son and agent (to be subsequently shown) testifies as to what was said. At most, it is but the expression of his present view of the condition of his mind at the time of the transaction. The son and agent of Puryear testifies, on being asked:

"What did you say to him when you gave him the check, relative to its being a payment on your father's account?"

"I did not say any thing, except told him that I wanted to pay the account in full as to the amount of it, and gave him the Sulzbacher check in part payment of it."

"Did Kirkpatrick & Co. raise any objection to taking the Sulzbacher check, or what did they say, if any thing, about it?"

"No, sir; they did not make any objection, but remarked that this was good for it."

This, with the delivery up of the notes and the receipting of the account in full, constitutes the facts of the transaction, as developed in the evidence. It will be remembered that this is not the case of Puryear giving his own check for his

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own account, and the law relating to that condition of facts need not be discussed. It is the case of the indorsement of a check of another to a creditor in settlement of the account, whether it be payment absolute or conditional, and to be governed by the law as to such transfer.

It is well settled that the taking of the debtor's check on account is not payment, unless it was so intended (*Springfield v. Green*, 7 Bax., 301); and it is true that the taking of a check of another by a creditor on account, is not necessarily payment, but must have effect according to the intention of the parties. In the absence of proof of a special agreement, the giving up or retention of the original security will, in general, be a decisive circumstance in determining that question, for, if the creditor means, in any contingency, to resort to the original indebtedness, he will scarcely be willing to surrender all evidence of that indebtedness to his debtor without fortifying himself with some evidence of the real nature of the transaction. *Morris v. Harvey*, 75 Va., 726; *Ins. Co. v. R. R. Co.*, 86 Va. (19 Am. Rep., 868).

Upon the facts of this transaction, as given by the son, and not denied by the complainant, we are of the opinion that the check was accepted in payment. In this connection it is objected that the pleadings raised no question as to notes delivered up with the receipt when the account was received; but receipt for the account is exhibited with the answer, and the account itself is proven

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by exhibit to deposition of defendant's witness before quoted on another point, and it shows that it was largely made up of the notes charged in it, and the answer avers that the check was delivered in payment of *this* account, and the proof so shows.

Where the creditor accepts the check of his debtor, it is his duty to make presentment and demand, and, of course, the same duty devolves upon him in the acceptance of an indorsed check, which is additional security. This check was not, in fact, presented until June 22, after the failure of the bank. Defendant averred, in answer, that Sulzbacher Bros. had on deposit at the time the check was drawn, and up to the failure of the bank, an amount sufficient to have paid the check, and this amount was lost to him by the negligence of the complainant. It is not denied that if these facts be true (and the failure to make demand is proven, though no proof is offered as to the condition of Sulzbacher's account, as averred), that the defendant would be discharged; and without proof of the last one he would be discharged if this was a suit upon the check, but it is insisted that, being a suit upon the original account, the burden of proof is not only on the defendant to show that presentment and demand was not made by the plaintiff, but that Sulzbacher Bros. had the amount of money on deposit to pay it, and that defendant sustained the loss of that amount by reason of such negligence in presenting the check.

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It is the duty of the holder of a check, if he receives it after banking hours, to present it during banking hours of the next day, if the bank is located in the same town, as was this one. If not, then to forward it next day by mail. If he fails to do this, and the check is afterwards not paid, his right, as against the indorser, is extinguished. *Morse on Banking*, Sec. 422; *Bank v. Merritt*, 7 Heis., 193; *Schoolfield v. Moon*, 9 Heis., 173. It is argued, however, that though the indorser's liability as such is extinguished, yet, if the indorser is the original debtor, his liability on the original indebtedness is not extinguished, unless it further appears that actual loss was sustained in consequence of such delay, and that the burden of proof is on the debtor to go further and show such loss.

This exact question, in express terms, has not been adjudicated in this State, and there is a great dearth of authority upon it, although it would seem to be one which must have repeatedly arisen. It is settled in this State, and many others, that in suits on checks, where there has not been due demand and notice, the burden of proof is upon the holder of the check to show that the drawer has sustained no injury. 3 Am. & Eng. Ency. of Law, and cases cited under the note as to burden of proof. See *Bank v. Merritt*, 7 Heis., 177.

The same doctrine has been applied in this State to the case of suit on the original indebtedness. *Betterton v. Roope*, 3 Lea, 215. It is true

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that in that case it appeared in fact that the drawer had funds to his credit, but this was not the controlling point in the case, and, besides, this was the case of a drawer's check and not an indorsed one.

We think the sound rule is, whether the suit be on the check indorsed, or on the original indebtedness, and it appears in the proof that such check was not duly presented and payment demanded, where the check has been received as absolute or conditional payment, then the burden of proof shifts to the holder to show that, notwithstanding such delay, the debtor was not injured. In the Merritt case, already cited, it is said if the presentment and demand be not properly made, the presumption of injury from the negligence of the holder arises, and the *onus* of showing that no injury has resulted from delay to the drawer rests on the holder. The presumption is, that the check is drawn on actual funds.

It is insisted in the argument of complainant, that a different rule is settled in the case of *Bradford v. Fox*, 38 New York, 289, and *Railroad Company v. Collins*, 3 Lansing, 29 (New York Supreme Court). But this is an erroneous application of these cases. The first was the case of the debtor giving his own check in payment, which the bank refused to certify without explanation, thus creating the inference that the check was worthless. It is true that the Court in that case said "that cases regarding the laches of the

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holder in demanding payment or in giving notice of dishonor, in which the *onus* of proving that no damages accrued was upon the holder, had no application, because this action was for the collection of the pre-existing debt, and the *onus* of proving payment was upon the defendant, and that it was not sufficient for him to show laches of the plaintiff, but he must go further, and show that loss had occurred."

But that was simply applying the rule, which, as we understand it, is applied by Courts holding that the burden of proof, in case where the debtor has given his own check in payment of his indebtedness, is upon the holder to show both delay and loss. Such holding puts the burden upon him, not only to show delay in presentment of the check, but loss to himself in consequence. If, however, payment, absolute or conditional, has been made by the check of another, indorsed by the debtor, the failure to present such check and demand payment properly, will release the debtor as to his liability upon the check and original indebtedness. *Smith v. Miller*, 43 New York, 171; *Daniel on Neg. Inst.*, Sec. 828, cited and approved, 3 Lea, 220.

The second case in Lansing's reports, 3 New York, cited, was also a case where the debtor had given his own check, and in which the rule stated in the Bradford case was applied. Put, too, upon the ground that the action was upon the pre-existing debt, and was not, therefore, concluded by

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proof of delay in presentment of the check, independent of any proof of loss, they sustain the theory that such delay alone does not discharge the original debt of the drawer. But, in the case of *Carroll v. Sweet*, reported in Vol. 13, Lawyer's Reports Annotated, a later case from the same State, and from the Court of Appeals, where provisional payment of a debt had been made by *indorsed check*, it was said: "The debt remained until discharged by payment of the check, or by such dealing with the check by the plaintiff as would, in judgment of law, convert what was originally a provisional payment into an absolute one. The check was dated August 22, 1887, and was drawn on the Ashbury Park National Bank, and was, on the same day, indorsed and delivered by the defendant to the plaintiff at the place where the bank was located. The plaintiff, on accepting the check, assumed, as between himself and the defendant, an obligation to present the same to the bank for payment within the time prescribed by the law-merchant; that is to say, not later than the next day after its date, and, if refused, to protest the same, and give notice of non-payment. *Smith v. James*, 20 Wend., 192. It was not presented until the thirty-first of August, nine days after it was received by plaintiff. The defendant was, by such delay, discharged from liability as indorser of the check, irrespective of any question of loss or injury. Presentment in due time, as fixed by the law-merchant, was a condition upon

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the performance of which the liability of the defendant as indorser depended, and this delay was not excused, although the drawer of the check had no funds or was insolvent, or because presentment would have been unavailing as a means of procuring payment. *Mohawk Bank v. Broderick*, 10 Wend., 304; *Gough v. Statts*, 13 Wend., 549.

"A different rule obtains as between the holder and drawer of a check. As between them, presentment may be made at any time, and delay in presentment does not discharge the liability of the drawer, unless loss to him has resulted. *Little v. Phenix Bank*, 2 Hill, 425.

"The action here is not upon the indorsement of the defendant, but upon the original indebtedness. If the discharge of the defendant's liability as indorser discharges also his liability as debtor for the original debt, the judgment must, on that ground, be reversed. In *Hamilton v. Cunningham*, 2 Black, 350, Chief Justice Marshall considered the effect of the neglect of the holder of a bill to give due notice of dishonor, whereby prior parties thereto were discharged upon the liability of the debtor for a debt for which the bill was drawn. After showing that the authorities in which the debtor had been discharged, proceeded upon the theory that he has sustained an actual loss, he reached the conclusion that the true principle is 'that, if a bill be received as provisional payment, the omission to give defendant notice of its dishonor deprives the creditor of his action on

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that bill, but does not compel him to take it in absolute payment or deprive him of his action on the original debt further than damage has been sustained actually or in *legal supposition* by the debtor.' See, also, *Gallagher v. Roberts*, 2 Wash. C. C., 191; *Flieg v. Sleet*, 43 Ohio St., 53."

Andrews, Judge, who delivered the opinion in that case, adds: "I am not sure that this doctrine is reconcilable with expressions in the opinion of this Court in *Smith v. Miller*, 43 N. Y., 171; 52 N. Y., 545." He then quotes from that case, and shows that judgment was therein rendered for the defendant on two grounds: "First, in the absence of proof of demand and refusal, and notice to the drawer according to the usual course, there could be no recovery upon the draft or upon the indebtedness upon which it was given; and, second, on the ground of negligence in failing to present the check on the day on which it was given. The last ground stated was, upon the facts, a satisfactory basis for the judgment; and the same principle was applied, upon similar facts, in *Meadville First National Bank v. Fourth National Bank*, 77 N. Y., 320." The Court then declines to determine whether the cases cited were in conflict or not, or which class of cases stood upon the better reason, but gave the defendant a new trial upon the facts.

We think, as therein indicated, that the extinguishment of liability as indorser on the check was an extinguishment of liability for the original

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indebtedness; that when defendant had shown such delay in the presentment and demand as discharged the indorser, it made out a case in which he was discharged from the original indebtedness; and if any facts existed which would rebut the case thus made out, the *onus* shifted to the plaintiff to show them. See, as to shifting of burden of proof on analogous question, Morse on Banking, Sec. 421, Subsec. *f*.

The judgment is therefore affirmed, with costs.

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MAUPIN v. BLANTON.

(Nashville. February 7, 1894.)

1. REDEMPTION OF LAND. *To whom redemption-money must be paid.*

To effect redemption of his land sold for debt, either under execution at law or under decree of the Chancery Court, the debtor must pay the redemption-money either to the purchaser personally, or, in case that is impracticable, to the Clerk of the Circuit Court of the county in which the land lies.

Code construed: § 2959 (M. & V.).

Acts construed: Acts 1889, Ch. 83.

Case cited: Rothwell v. Gettys, 11 Hum., 135.

2. SAME. *Same.*

And payment of the redemption-money to the Clerk and Master is ineffectual, even where the sale was made by him under decree of the Chancery Court and the fund realized placed in his hands as receiver, to be loaned out for the benefit of the creditor.

FROM BEDFORD.

Appeal from Chancery Court of Bedford County.
ROBERT CANTRELL, Ch.

WM. B. BATES for Maupin.

IVIE & IVIE for Blanton.

WILKES, J. . The undivided interest of R. C. Maupin in a town lot in Wartrace, Bedford County, was

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sold under decree of the Chancery Court of Bedford County, and was purchased by his brother, James S. Maupin, at his bid of one hundred dollars. The sale was made for cash, and subject to the right of redemption, and was confirmed August 7, 1890, and title divested and vested accordingly. The Clerk and Master, as receiver, was directed to loan out the one hundred dollar fund for an indefinite time, and to give James S. Maupin, the purchaser, the preference in borrowing the same. Thereupon James S. Maupin, the purchaser, executed his note to the Clerk and Master and receiver for the one hundred dollars, and the amount was not actually paid by him into Court.

August 6, 1892, R. C. Maupin, the debtor, whose lot had been sold, paid to the Clerk and Master of Bedford County \$112, and took his receipt for the same in these words:

“One hundred and twelve dollars received of R. C. Maupin, which he tenders as redemption of a lot sold by the undersigned on May 1, 1890, said sale confirmed August 7, 1890, in the case of *James S. Maupin v. R. C. Maupin*. See Minute Book 19. This August 6, 1892.

“J. T. BUTLER, C. & M.”

At that date James S. Maupin was a resident of Moore County, and the payment of the \$112 by R. C. Maupin to the Clerk and Master was without his knowledge or consent.

The money thus paid into the hands of the

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Clerk was tendered to James S. Maupin, and he refused to receive the same, insisting that the lot could not be redeemed in this way. In the meantime R. C. Maupin, on the same day the money was paid to the Clerk and Master, acting upon the idea that he had redeemed the lot, conveyed the same to B. W. Blanton for a recited consideration of six hundred dollars.

James S. Maupin thereupon filed his bill, charging that the lot had not been redeemed as provided by law, and seeking to have set aside, as a cloud upon his title, the conveyance to Blanton.

Blanton filed his answer as a cross-bill, alleging that the payment to J. S. Butler, the Clerk and Master and receiver, was good and a legal redemption, and asked the Court to so decree and remove the claim of James S. Maupin as a cloud upon his title.

The Chancellor held that the redemption was not legally made, and dismissed the cross-bill, and sustained the bill of James S. Maupin and set aside the conveyance of R. C. Maupin to Blanton, from which Blanton appealed, and assigns errors, which simply raise the question whether the lot was redeemed in the manner provided by law.

The Act of 1824 provided, among other things, that when the purchaser of land sold subject to redemption resides out of the county in which the sale is made, the debtor may redeem by paying the redemption money to the *Clerk of the County Court*.

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This Act was amended by the Act of 1843, so as to substitute the Clerk of the Circuit Court of the county where the land lies for the Clerk of the County Court of the county where the sale is made, as the proper officer to whom the redemption money may be paid.

This Act, thus amended, was carried into the Code of 1858 as § 2136. The Act of 1870, Ch. 111, amended this section of the Code so as to read: "The party entitled to redeem under the provisions of this chapter may pay the redemption money to the Clerk, instead of the debtor." And this was carried into the compilation by Thompson & Steger as § 2136a.

This Act of 1870 was repealed by the Act of 1889, Ch. 83, Sec. 2; and, by this Act, § 2136 of the Code was so amended as to insert after the words "the debtor," the words "or party entitled to redeem," so that the statute, after that Act, is made to read:

"Sec. 2136. When the purchaser is absent from his usual place of residence, so that the tender to him is prevented, or resides out of the county where the land lies, the debtor, or party entitled to redeem, may pay the redemption-money to the Clerk of the Circuit Court of the county in which the land lies, to be held by him for the person entitled to it, and such payment shall be good to all intents and purposes." See Shannon's Code Supplement, § 2959.

It is insisted that this Act is intended to apply

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only to sales under execution at law, and that, when the sale is made under the decree of the Chancery Court, the redemption-money should be paid to the Clerk of that Court from which the sale was made, and this contention is well founded in reason. But the law is not so written. The privilege of paying to any one else than the purchaser rests wholly upon the statute, and that has provided only one officer to receive the redemption-money, to wit, the *Clerk of the Circuit Court of the county* where the land lies, in the event the purchaser lives in another county, etc.

The case of *Rothwell v. Gettys*, 11 Hum., 135 to 140, construed the Acts of 1824 and 1843, and held that they applied to all sales made subject to redemption, whether under execution at law or decree of the Chancery Court, or under mortgages or deeds of trust, and that this mode of redemption was alike applicable to all cases, whatever might be the mode or kind of sale, when the debtor has a right to redeem. 11 Hum., 138.

The statute provides only two modes of redemption—one by paying the redemption-money to the purchaser, the other by paying it to the Clerk of the Circuit Court.

It can make no difference in this case that the Clerk and Master was made receiver to loan out the purchase-money, nor that the purchase-money was thus being loaned for the benefit of James S. Maupin, the purchaser. The Clerk and Master and receiver was in no sense the purchaser of the

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lot, nor did he in any way represent the purchaser of the lot, as such purchaser, and the funds in his hands, as receiver, were not, in anywise, different from any other funds that he may have had in his hands to loan out, simply because they were received from the sale of this lot, or held for the benefit of the purchaser of the lot.

There is no error in the decree of the Chancellor. The debtor could not effect the redemption of his lot by paying the redemption-money to the Clerk and Master and receiver, or in any other way than as the statute provides, and the decree of the Chancellor is affirmed with costs.

Nelson v. Kinney.

NELSON v. KINNEY.

(Nashville. February 17, 1894.)

1. FRAUDULENT CONVEYANCE. *What is not, between husband and wife.*

A conveyance by a husband to his wife, at a time when he is solvent, and not in anticipation of insolvency, and without any intent to defraud existing or subsequent creditors, in consideration of his moral duty to provide for her and to protect her against his recklessness, dissipation, and gambling debts, is not fraudulent as against creditors of a firm of which he is a member, whose debts were contracted without knowledge of the property conveyed to the wife. (*Post*, pp. 440, 441.)

2. SAME. *What is not, between parent and child.*

A father has the right, upon becoming insolvent and unable to provide for his debts, owing to general financial depression throughout the country, to prefer a debt due his daughter, by conveying property to her in which he has an equitable interest, and such conveyance, made in good faith, is not fraudulent as against his creditors or creditors of a firm of which he is a member.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
ANDREW ALLISON, Ch.

JOHN RUHM & SON and JAMES TRIMBLE for Nelson.
SON.

VERTREES & VERTREES for Kinney.

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WILKES, J. This is a creditor's bill to set aside an alleged fraudulent conveyance. It was filed April 25, 1892, and alleges that, on August 15, 1891, George S. Kinney, G. P. Lipscomb, and R. R. Reno, partners doing business at Nashville under the name of Kinney & Co., were indebted, by note, to Charles Nelson in the sum of \$81,546.69. On that day, the Kinney Distilling Company, a corporation that succeeded Kinney & Co. in business at Nashville, executed its notes in the stead, and in satisfaction of, the notes of Kinney & Co. These notes were indorsed by George S. Kinney, G. P. Lipscomb, and R. R. Reno, the individual members of the old firm of Kinney & Co. It further alleges that, on August 15, 1891, when the notes of the Kinney Distilling Company were executed, it was understood that the original indebtedness of Kinney & Co. was not to be canceled. Ten of these notes were paid, leaving fifty notes, aggregating \$67,955.59, unpaid, and *these* notes are sued on in the bill.

Charles Nelson died on December 11, 1891, leaving a will, whereby he bequeathed the most of his property to his wife, Mrs. Louisa Nelson. These notes were transferred to her in part payment of the legacy due to her, and she *alone* it is who now sues upon the notes as the holder thereof.

The bill further alleges that, on April 19, 1892, George S. Kinney conveyed a certain house and lot on Cedar Street, in Nashville, of which he was the owner, to his daughter, Mrs. Ittie K. Reno,

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for an *alleged* consideration of \$19,000, paid in a *credit on indebtedness* due to her. This is the conveyance which is attacked by the bill. It alleges that this conveyance is a voluntary conveyance; that it was made to defeat the creditors of Mr. Kinney and Mr. Reno; that there was no indebtedness (as recited in the deed) from Kinney & Co. to Mrs. Reno; that, if there was any such debt, it was not her separate estate, but was Mr. Reno's *jure mariti*; that a credit on the books of Kinney & Co., in favor of Mr. Reno, was transferred to Mrs. Reno's account to defeat the complainant; that this credit was not separate property, but belonged to Mr. Reno *jure mariti*.

The answer denies the allegations of the bill. It states, further, that George S. Kinney, G. P. Lipscomb, and R. R. Reno were indebted to Mrs. Ittie K. Reno in the sum of about \$28,000. This money was due by note for loaned money, which they had borrowed a year or two before. It states that Mrs. Reno acquired the money she had loaned Kinney & Co. in this way: In August, 1888, Mr. Reno gave, and by deeds duly registered October 8, 1888, conveyed, to Mrs. Reno the remainder interest (after the death of his father, General Reno) in two tracts of land in Pennsylvania. These remainder interests were then worth less than \$12,000. Some months afterward, General Reno died unexpectedly, leaving Mrs. Reno the owner of the land in fee. These lands were held by Mrs. Reno to her *sole, separate, and exclusive use*.

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In June, 1889, after the life estate had fallen in, she sold one piece for \$12,000, and loaned the money to Kinney & Co. Shortly afterward she mortgaged the other for \$15,000, and loaned that to Kinney & Co. For these loans they gave her their three notes. July 10, 1892, the three notes were renewed by a note for \$28,000, which included \$1,000 of interest.

The answer further claimed that the Cedar-street property was conveyed as a payment on the \$28,000 note. She took it at a valuation of \$28,000, but there was a mortgage in favor of James Walsh for \$8,700, which she assumed, and gave credit on the note to the amount of \$19,300. It alleged that, at the time Mr. Reno conveyed the lands to her, he owed nothing individually, and that Kinney & Co.—George S. Kinney and G. P. Lipscomb—had property and assets amply sufficient to pay all their debts, without including the property conveyed to Mrs. Reno.

The answer claimed that the conveyances to Mrs. Reno by Mr. Reno were made in good faith, without fraud, or even suspicion that ample property did not remain to pay all debts for which Mr. Reno was in any way bound; and that property and assets amply sufficient to pay every thing did remain after said conveyance to her.

It alleged that the notes of Kinney & Co. *were canceled and delivered up* when the notes of the Kinney Distilling Company were executed, and collaterals were given with the company's notes which

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Charles Nelson did not have before; also that there was no agreement that the notes of Kinney & Co. should not be canceled.

It also alleged that the conveyance by George S. Kinney was not voluntary, but was made in good faith to pay an honest debt that was justly due. Much proof was taken, and, on the hearing, the Chancellor, upon consideration of the whole case, dismissed the bill, and complainant, Mrs. Louisa Nelson, appealed, and has assigned errors, as follows:

First.—Because the conveyances by Reno to his wife, acknowledged on August 29, 1888, and recorded in Pennsylvania on October 8, 1888, were voluntary, and hence fraudulent as to complainant, who was a creditor.

Second.—Because the property conveyed by Geo. S. Kinney to his daughter, Mrs. Ittie K. Reno, was so conveyed, to the extent of \$19,300 (the balance, \$8,700, due on the mortgage being only assumed and still unpaid), in consideration of the debt due Mrs. Reno by Kinney & Co. for money realized from the sale and mortgage of the real estate fraudulently conveyed by Reno to his wife, as hereinbefore stated. The property so conveyed by Kinney is liable for the payment of complainant's debt.

Third.—Because Reno was insolvent when he made the voluntary conveyance to his wife, and had no property left to pay his liability to complainant; because his firm was insolvent at the

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time, and never was out of debt to complainants from the time of Reno's voluntary conveyance to the filing of the bill of complaint; because the payments made to complainants during the period from the voluntary conveyance to the filing of the bill, when adding thereto new obligations created, did not suffice to discharge the indebtedness existing at the time.

Fourth.—Because the proof shows that Reno put into the firm, so as to acquire an interest in it, the sum of \$15,000 as his part of the capital stock; that he gradually drew out that money so by him put into the firm; that, owning substantially no other property, he conveyed to his wife, as stated, the Pennsylvania realty, he and his firm being then insolvent, and heavily indebted to complainant and other creditors; that Mrs. Reno sold that property, and put the proceeds into the firm as a loan; that afterwards Mr. Kinney, one of the partners—the firm and all the partners being then insolvent and the old debt still existing—conveyed to Mrs. Reno his last piece of property in payment of the debt due her for money realized out of the Pennsylvania realty, which had been voluntarily and fraudulently conveyed to her by her husband.

Fifth.—Because upon the whole case, as set forth in the original bill and answer, and made out in the proof, full relief can be granted complainant.

Under the first assignment it was insisted the conveyances were fraudulent:

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(a) Since Reno, by the several conveyances to his wife, which are shown in the record to have been made contemporaneously or about contemporaneously, and which were voluntary, rendered himself insolvent, having no other property remaining save his interest in the firm of Kinney & Co., and that firm being insolvent at the date of the conveyance.

(b) Since, at the time of the said voluntary conveyance, Kinney & Co., of which firm Reno was a member, were heavily indebted to complainant and other creditors; since they were insolvent; and since Reno had not sufficient property left to pay the debts due complainant, and other debts for which he was liable as a member of the firm.

(c) Since the debt due complainant was an existing debt; but it matters not whether it was an "existing debt" at the dates of the conveyances or a subsequent one.

(d) Since Reno made the conveyances to his wife with the "fraudulent intent" to hinder and delay his creditors.

The testimony in the case has taken a wide range under the charges in the bill, and the additional facts set up in the answer.

It appeared that George S. Kinney had been in the wholesale liquor business, at Nashville, as the leading, active member of six different firms or combinations, for about thirty years, and during twenty-six years of that time had been a constant, heavy customer of Charles Nelson, a distiller and

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dealer in whiskies. Mr. Nelson died December 11, 1891. Up to that date Major Kinney's purchases from him amounted to over a million dollars, many of them on a credit, for which he paid at the rate of eight per cent. per annum, besides the profit on the whisky.

In 1878, G. P. Lipscomb married a daughter of Major Kinney, and was admitted to the firm. In 1885, R. R. Reno married Miss Ittie Kinney, another daughter, and he was admitted to the firm, buying out the fourth interest of Mr. McGlothlin at \$15,000, which he paid. The firm name was then changed to Kinney & Co., of which the members and interests were as follows: Major Kinney, one-half; Mr. Lipscomb, one fourth; and Mr. Reno, one-fourth. That is to say, the members of the family alone composed the firm. The same close relations existed at home. They all three, with their families, lived in the same household as one family, and have so lived continuously ever since.

The firm of Kinney & Co. continued in business from 1885 until August, 1891, when it was merged into a corporation—the Kinney Distilling Company. The business of Kinney & Co., during 1888, 1889, and a part of 1890, was large and prosperous. May, 1889, Kinney & Co. bought (mainly upon a credit) a distillery and a lot of whisky from Mr. John Woodard. They paid, and were to pay, \$67,000. They began to operate the distillery, and, after making about 3,500 barrels of whiskies, closed down in May, 1890.

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During the years 1890 and 1891, a large number of Kinney & Co.'s customers failed, owing to the stringency of the times, which culminated in the panic of 1892-3.

July 29, 1891, the Kinney Distilling Company, an incorporated company, bought out Kinney & Co., and soon after assumed the debt to Charles Nelson, in his life-time. The debt, August 15, 1891, when it was assumed, amounted to \$75,100.92. Kinney & Co. gave their sixty notes, each for \$1,359.12, aggregating \$81,546.89. Ten of these notes were paid. This left fifty unpaid—or an aggregate of \$67,955.59. Ten of these notes (the last to become due) were secured by a collateral vendor's lien note for \$5,600, and 446 barrels of whisky, worth \$7,100. The other forty notes were secured by certificates for 620 shares, of \$100 each, of the stock of the Kinney Distilling Company.

All these fifty notes were made by the Kinney Distilling Company, payable to Charles Nelson, and indorsed individually by Mr. Kinney, Mr. Lipscomb, and Mr. Reno.

The 446 barrels of whisky, held as collateral, brought, since suit was instituted, \$7,000. The \$8,333.33 note, so far as appears, is good for the balance due of \$5,600, and, as a consequence, the debt will be credited by about \$15,500, which, exclusive of interest, would leave it about \$55,000 at this time.

In view of these facts, it is insisted that there has been an entire novation of the debt; that the

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notes of the corporation have been substituted for those of the firm; that these are secured, to some extent at least, by collaterals; and that Major Kinney, Reno, and Lipscomb are now only bound as indorsers for the corporation, which has become the principal debtor; and that this is the shape of the debt now sued on.

Appellants insist that it is not a novation, but a continuation of the old debt by the same debtors, under a new shape, but always the same in identity.

It appears that Mr. Reno paid Mr. McGlothlin \$15,000 cash for his interest, which went to his credit in the firm. A considerable part of this was drawn out by Mr. Reno, who had fallen into convivial habits and become reckless of his money. May 24, 1888, he conveyed to his wife a phaeton and horse and \$2,600 in money, and on July 27, 1888, a diamond cross, ear-rings, etc., which had been given them as bridal presents. These conveyances were for love and affection, and to the sole and separate use of the wife, and were both registered, when made, in Davidson County. August 29, 1888, he conveyed to her a house and lot in Harrisburg, Pennsylvania, and a tract of one hundred and ninety-five acres of land near that city, and the deeds were also for love and affection, and registered in Pennsylvania soon after being executed. The land was conveyed to Mrs. Reno's separate use, with power to sell as a *feme sole*. The \$2,600 cash had never been in the firm

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of Kinney & Co., and \$2,300 was, soon after it was given, paid out for Mr. Reno's benefit by his wife.

The Pennsylvania property was incumbered by the life-interest of General Marcus Reno, the father of R. R. Reno, as tenant by curtesy. He was then fifty-five years of age, and the remainder interest thus conveyed was worth about \$12,000 at the time of the conveyance. General Reno, however, died unexpectedly March 30, 1889, and Mrs. Reno became owner in fee of the Pennsylvania property. It was suggested to her by Mr. Lipscomb, the book-keeper and office man of Kinney & Co., that she sell it and loan the money to the company at eight per cent. interest. She did so. In June, 1889, she sold one piece for \$12,000, and June 10, 1889, loaned the money to Kinney & Co., taking their note payable to herself. She mortgaged another piece for \$15,000, and loaned the money to the company, taking notes, which then aggregated \$27,000, from the firm. That the money represented by these notes was the proceeds of these lands there is no controversy. It appears that it was forwarded to her in New York exchange, to her order. She received it, loaned it to the firm, took the firm's notes, executed by Mr. Lipscomb, and Mr. Reno appears to have had nothing to do with it at any time.

July 10, 1892, the notes were consolidated into one for \$28,000—\$1,000 of interest being included. The original and consolidated notes are exhibited in the record.

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Major Kinney built a house on Cedar Street, facing the Capitol, in 1888, and gave a mortgage to James Walsh for \$15,000 upon the house and lot, to enable him to build it.

April 18, 1892, Major Kinney conveyed this property to Mrs. Reno, in part payment of the \$28,000 note, she taking it at a valuation of \$28,000, but giving credit on her note for only \$19,300, as \$8,700 of the mortgage to Walsh was an incumbrance on it, which she assumed. These facts are recited in the deed.

The bill in this case attacks this deed from her father, but does not impeach the conveyances to Mrs. Reno by her husband, and makes no mention of them. It is insisted, however, that the scope of the bill and answer brings in question these conveyances by the husband to the wife, because, out of them arose the alleged separate estate and indebtedness to Mrs. Reno, and it is insisted that, inasmuch as the answer has opened up these transactions, their good faith may be questioned, to see whether there was any valid consideration for the transfer from the father to the daughter. Waiving the question of pleading, the Court thinks it best to decide the case upon its merits.

Much controversy is had over the condition of the firm of Kinney & Co., October 8, 1888, when the deeds were made by R. R. Reno to his wife. It is insisted, on the one hand, that the firm was abundantly solvent, and had an excess of fifty or sixty thousand dollars over its indebtedness. On

the other hand, it is insisted that the firm was insolvent by about the same amount. Both contentions are claimed to be proven by the books of the company—the results for appellants being arrived at by experts, and for appellees by the members of the firm.

Without going into an analysis of these figures and statements, which are very extensive and exhaustive, we are content to say that we are convinced that at this date (July, 1891), the firm of Kinney & Co. was abundantly solvent, and was believed by Nelson, as well as every one else, to be so. We are further convinced that Nelson did not look to Reno as adding any thing to the sufficiency of his debt, or the solvency of the firm, and did not even know of his Pennsylvania property, and, if he knew, did not care for the conveyances to his wife of that property as well as the personal property heretofore referred to.

That these conveyances by the husband to the wife were made in pursuance of a high moral duty which the husband, on account of his dissipated habits, owed the wife, we are convinced; and that, at the time they were made, they were without fraudulent intent as to creditors, is evident. We are of opinion that the husband's financial condition at that time warranted him, legally, in making the conveyances to the wife, for her protection against his recklessness and gambling debts; but they were not intended, nor was their effect, to avoid the claim or demand of any *bona fide*

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creditor then existing or anticipated. No faith was given to this property by Mr. Nelson in dealing with the firm of Kinney & Co. It does not appear that these conveyances were made in view of any possible present or prospective insolvency of the firm of Kinney & Co., of which Mr. Reno was a member, but rather to protect his wife against his gambling propensities, which might involve him individually in the future.

If there had been fear, or even suspicion, of trouble as to the solvency of Kinney & Co., Mrs. Reno would not have loaned them this money without security, nor would her husband and father and brother-in-law have permitted her to do so.

We are of opinion that the conveyances made by Reno to his wife were not fraudulent as to creditors of Kinney & Co. The sales by her and the loan of the money to the firm by her was a *bona fide* transaction, in good faith, and she was a creditor of Kinney & Co. to the amount of her notes, and entitled to all the protection to which a *bona fide* creditor is entitled as against his debtor. If we are correct in this, and of it we have no doubt, the only remaining question is, Did Major Kinney, when misfortune overtook him in his business, and his property shrank, from the financial depression which swept over the country, until he was no longer able to conduct his business and provide for his debts, have any right to secure, in part, this debt due his daughter, by conveying to her this property, in which he had an equitable in-

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terest, subject to the mortgage? That a debtor may provide for one creditor in preference to another, by a sale or special assignment, there is no doubt, and never has been in Tennessee. That it was a high moral duty to protect his daughter is as evident as that it was his legal privilege, provided always, that it was done in good faith. We are unable to place this case on any other basis than this, and this is conclusive of the case.

It is insisted that the debt sued on in this case was not in existence when the deeds were made to the wife; that the debts then existing have been paid, and whatever was unpaid by Kinney & Co. on August 15, 1891, was novated in the new debt by the Kinney Distilling Company on that date. And the following authorities are relied on: *Nichol v. Bate*, 10 Yer., 433; *Isler v. Baker*, 6 Hum., 185; *Cherry v. Frost*, 7 Lea, 6; *White v. Bettis*, 9 Heis., 649; *McDonough v. Elam*, 20 Am. Dec. (La.), 284; 2 Daniel Neg. Insts., Sec. 1266 (2d Ed.); *Stroud v. Rankin*, 2 Bax., 74.

We are inclined to think this position well taken, but it need not be decided in this case.

It is also insisted that, under the frame of the bill, the *bona fides* of the conveyances from the husband to the wife cannot be attacked in this case, because not referred to in the bill, and the following authorities are relied on: *Midmer v. Midmer's Ex'rs*, 12 C. E. Green, 548; *Andrews v. Farnham*, 2 Stockton, 91; *Howell v. Sebring*, 1 McCarter, 84; *Brown v. Bulkly*, 1 McCarter, 451; *Hoyt v.*

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Hoyt, 12 C. E. Green, 402; *Auston v. Ramsey*, 3 Tenn. Chy., 118; *Merriman v. Lacefield*, 4 Heis., 210; *Johnson v. Luckadoo*, 12 Heis., 270; *Neal v. Robinson*, 8 Hum., 435; *Mulloy v. Young*, 10 Hum., 298; Gibson's Suits in Chancery, par. 542.

We have deemed it proper to consider the case on its merits, as disclosed by the answer and proof as well as by the bill.

A very able argument is made also on the construction of the Code (M. & V. compilation), §§ 2424 and 2430, the position maintained being that a voluntary conveyance to a wife cannot be set aside by subsequent creditors upon the ground that the husband was at the time in debt to existing creditors who remained unpaid; and the difference between the Act referred to (Code, § 2424) and the statutes of 13 and 27 Elizabeth is forcibly pointed out and commented upon, and the conclusion is tersely stated in *Lloyd v. Fulton*, 1 Otto, 485, as follows:

"The rule, as now established, is that prior indebtedness is only presumptive, and not conclusive, evidence of fraud, and this presumption may be explained and *rebutted*. Fraud is always a question of *fact* with reference to the intention of the grantor. Where there is no *fraud*, there is no infirmity in the deed. Every case depends upon its circumstances, and it is to be carefully scrutinized. But the vital question is always the *good faith* of the transaction. *There is no other test.*" 1 Otto, 485.

To the same effect is 112 U. S., 149. "There

is no other test" than the *good faith* of the transaction, so far as *subsequent* creditors are concerned, and there cannot be under statutes like ours. There is no presumption of fraud, and fraud in *fact* must be *established*; and that is an "open question," to be determined *upon the facts*. *Laird v. Scott*, 5 Heis., 345; *Nicholas v. Ward*, 1 Head, 326.

We do not deem it necessary to pass upon this question in this case. When the facts are considered, there is no pretense of actual or intentional fraud in the present case. In the first place, as already shown, these persons all believed, in fact knew, that Kinney & Co. were doing a large and lucrative business, and that their assets were largely more than sufficient to pay every debt that they owed. Nothing was withdrawn from the *firm* assets. The deeds were promptly put to record, and no credit was extended to Reno on the assumption that he owned property in Pennsylvania. Indeed, he was supposed to have no property at all, Mr. Brengleman says. The debts due Charles Nelson were closed by note at the end of every month. All the debts contracted and notes made (and notes executed in renewal thereof) prior to October 8, 1888 (the date when the deed was registered), were *paid*, and paid in money. There is no evidence of any fraudulent design, or any "kiting" of debts, but every thing was open, public, and fair. Kinney & Co. were doing a business of \$450,000 a year, and therefore dealing

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with other persons more extensively than they dealt with Mr. Nelson.

Our conclusion is that there was no fraud in fact, or actual intention to defraud or delay any creditor, in the conveyances from Reno to his wife, or in that of Major Kinney to his daughter. The credit, in point of fact, was not extended upon the faith of Mr. Reno's property. There was, therefore, no fraud upon any creditors, either existing or subsequent, and, as a consequence, the conveyances to Mrs. Reno are unassailable, and the bill must be dismissed, with costs.

State v. Odom.

STATE v. ODOM.

(Nashville. February 22, 1894.)

1. CRIMINAL COSTS. *State's liability is strictissimi juris.*

The liability of the State for costs of criminal prosecutions is *strictissimi juris*. It does not attach except in the special cases, and cannot be enforced except in the particular manner, distinctly prescribed by statute.

Cases cited and approved: State v. Delap, Peck, 91; Tucker v. State, 2 Head, 555; Avery v. State, 7 Bax., 328; State v. Nolan, 8 Lea, 663; State v. Martin, 10 Lea, 549; Morgan v. Pickard, 86 Tenn., 211.

2. SAME. *Same. Example.*

To justify judgment over against the State for State's costs previously adjudged against a defendant upon conviction for a felony, the Court must either adjudge defendant insolvent or have return of execution *nulla bona*. The certification of the bill of costs by the judge and district attorney, and its payment by the county, does not supply the want of such adjudication of insolvency or return of *nulla bona*.

Cases cited and approved: State v. Delap, Peck, 91; Tucker v. State, 2 Head, 555; State v. Martin, 10 Lea, 550.

3. SAME. *Relaxation.*

A county that has improperly paid a duly certified bill of costs in a larceny case, for which the State and not itself was liable, cannot subsequently recover of the State the amount thus paid, by mere motion to retax costs in the original case. The proceeding would be, in effect, a suit against the State, which is forbidden by statute. Such payment would be voluntary and officious. The county's claim is not for costs, but for money paid for use and benefit of the State. The remedy, if any, is by appeal to the Legislature.

Code construed: § 3507 (M. & V.).

FROM DAVIDSON.

Appeal in error from Criminal Court of Davidson County. J. M. ANDERSON, J.

State v. Odom.

Attorney-general PICKLE for State.

ELI T. MORRIS, WM. M. DANIEL, and J. M. DICKINSON for County.

WILKES, J. This is a motion to retax criminal costs in a case of felony. The costs in the cause were taxed at the January term, 1886, and have been paid by the county of Davidson, and the cause has gone off the dockets.

It appears that the costs of the State's witnesses summoned before the grand jury were adjudged against and paid by the county of Davidson, and the cause is now re-instated upon the docket, and motion is made to retax such costs against the State in favor of the county.

There are an indefinite number of such cases in the counties of Davidson and Montgomery, in which it is proposed to enter similar motions, and the present proceeding is to test the liability of the State in all cases similar to it.

A motion to retax all such costs as accrued and were paid by the county of Davidson within the last six years has been made and allowed in the Criminal Court of Davidson County, and the correctness of that action is not before us in this case.

In the present case, as well as in all others to be affected by this decision, the costs sought to be retaxed were adjudged, taxed, and paid more than six years before the motion in this cause was

made, and after the cases had been stricken from the docket, extending back indefinitely, perhaps to the organization of Davidson as a county, and involving, in the aggregate, many thousands of dollars.

The Judge of the Criminal Court of Davidson County disallowed the motion on grounds of public policy, and because of the great lapse of time and the laches of the county in seeking its remedy, and from his judgment the county of Davidson has appealed.

It is conceded by the Attorney-general for the State that the costs sought to be retaxed were not properly chargeable to the county of Davidson, but, as an original proposition, should have been taxed against the State; but it is now denied that the county of Davidson can have them retaxed.

It is well settled that no judgment can be rendered against the State for costs of criminal prosecutions, except such as are expressly authorized by statute, and it is equally well settled that all the requirements of the statutes in regard to costs chargeable to and adjudged against the State must be strictly complied with. *State v. Delap*, Peck, 91; *Tucker v. The State*, 2 Head, 555; *Avery v. The State*, 7 Bax., 328; *State v. Nolan*, 8 Lea, 663; *State v. Matlin*, 10 Lea, 549; *Morgan v. Pickard*, 2 Pickle, 211.

Upon an examination of the record in this cause, we are of opinion that it would not warrant a judgment against the State, even as an original proposition.

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Defendant Odom was convicted of larceny. This being so, judgment should have been rendered against him for all the costs of his prosecution, and there should have been either an adjudication of his insolvency in the judgment or an execution should have been issued and returned *nulla bona* before any judgment could be rendered or costs retaxed against the State. *State v. Delap*, Peck, 91; *Tucker v. The State*, 2 Head, 555; *The State v. Mullin*, 10 Lea, 550.

All these facts must appear upon the face of the record, and the mere fact that the bill of costs has been made out and properly certified by the Judge of the Criminal Court and the prosecuting attorney for the State, and paid by the county, is not sufficient.

But a motion to retax costs in this and similar cases cannot be sustained.

The county of Davidson has no costs against the State of Tennessee. Its demand is more properly for money advanced and paid out for the use and benefit of the State, and cannot be maintained by a motion to retax costs in cases where the county of Davidson was not a party.

The county is not, and cannot be, legally a party in any prosecution for a mere felony which does not include a misdemeanor also. No legal judgment for costs could be rendered against it in such cases, and the payment of such judgment would be voluntary and officious, and no right

could grow out of such payment either to retax costs or for moneys expended.

In addition, no suit can be brought against the State without its permission, nor can the funds in the State treasury be reached by a judgment at law. Code (M. & V.), § 3507.

This is not a harsh application of the statute to Davidson County, but it is the application of the same statute which stands in the path of every creditor of the State, no matter how just or meritorious his demand may be. It does not follow that the State will not do exact justice to all her creditors.

An appeal to the General Assembly is the proper remedy, and, upon such appeal, the State will do that which, under all the circumstances, is right and proper as between it and the several counties.

The judgment of the court below is affirmed with costs.

State v. Ledford.

STATE v. LEDFORD.

(Nashville. February 22, 1894.)

SUIT AGAINST STATE. *County cannot maintain.*

A county cannot, any more than any other creditor, maintain a suit against the State. The remedy, if any, in such case, is by appeal to the Legislature. (See *State v. Odom*, *ante*, p. 446.)

FROM MONTGOMERY.

Appeal in error from Criminal Court of Montgomery County. M. SAVAGE, Sp. J.

Attorney-general PICKLE for the State.

WM. M. DANIEL for the County.

WILKES, J. This case is similar to the case of *The State v. Odom*. The Special Judge, M. Savage, hearing the cause in the Court below, gave judgment for the county against the State, and the State appealed, and has assigned errors.

The judgment must be reversed, and the motion to retax costs denied, with costs against the county of Montgomery.

It is insisted that in the case of the *State v. Montgomery County*, decided by this Court at the

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December term, 1889, the county of Montgomery was held liable to the State upon a similar case. It appears that the county of Montgomery had for a number of years collected from the State costs for the board of prisoners in the jail and work-house of that county who had been convicted of felonies and sentenced to the jail or work-house, such costs accruing subsequent to their convictions. These costs had been made out and properly certified by the Criminal Judge and Attorney-general, and paid by the Comptroller, and the decision of this Court was that Montgomery County must refund such costs.

It is insisted that the State should be willing to do now what she then compelled Montgomery County to do—that is, repay the costs which had been improperly paid out. This is a strong moral but not a legal argument.

The case of *The State v. Montgomery County*, was not a motion to retax costs, but a proceeding by a bill in chancery to recover moneys illegally taken out of the treasury of the State and applied to costs for which the State was never liable, and a portion of which, at least, was paid into the treasury of Montgomery County for jail purposes. The questions that are raised in this suit were not raised in that, and, from the very nature of the cases, could not be. But, if the cases were identical, still the county of Montgomery could not sue the State, and reach the funds in its treasury by a judgment at law, any more than

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any other *bona fide* creditor could, no matter what suits the State may have brought against it heretofore. Her only recourse is an appeal to the Legislature, which will act after a full consideration of all the facts and equities of the case.

While it is the plain letter of the law that the State cannot be sued, we certainly do not feel disposed to relax the rule so as to flood the State treasury with claims running back through a series of years, perhaps for a half century, the aggregate of which we can only surmise. The state has made no provision for the payment of such claims, and if it shall see proper, under all the circumstances, to allow them, it will no doubt provide the revenue to pay them; and, until that is done, this Court can only enforce the law which has been enacted for the protection of the State treasury from unexpected and unforeseen demands.

 Colvert v. Wood.

COLVERT v. WOOD.

(Nashville. March 1, 1894.)

1. WILLS. *Election and its effects.*

Testator devised to his widow and eight children, or their representatives, specific and distinct interests or parcels of realty. Three devisees declined to take under the will, and recovered, by suit, three undivided fifths in the lands devised to themselves and two others, respectively, upon the theory that these lands were the property of a firm composed of testator, said three dissenting devisees, and another. The testator's one-fifth interest in the partnership lands devised to the three dissenting devisees, and withdrawn from the operation of the will by their dissent, having been sold, the present contest arose over the distribution of this fund, the three dissenting devisees claiming that it should be distributed as in case of intestacy, and the disappointed devisees, who were deprived of their portions under the will by the action of the said dissenting devisees, claiming that it should be applied to compensate them for the loss thus inflicted.

Held: The dissenting devisees are estopped, by their election, to take any thing under the will, and further estopped to take, as heirs, any part of said fund until the disappointed devisees have been fully compensated for their loss. (*Post*, pp. 456-463.)

2. SAME. *Same.*

And the facts stated make a clear case where the three dissenting devisees were put to and exercised their right of election. (*Post*, pp. 459, 460.)

3. SAME. *Not annulled by devisees' dissent, when.*

And the devises and legacies of this will, being specific and independent, and for the most part not affected by the action of the three dissenting devisees, the entire will is not thereby rendered nugatory. (*Post*, pp. 463, 464.)

 FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
ANDREW ALLISON, Ch.

Colvert v. Wood.

NOAH W. COOPER and COLYAR, WILLIAMSON & COLYAR for Colvert.

STOKES & STOKES for Leek.

WILKES, J. In September, 1878, Thomas Leek died testate in Davidson County. He left a widow, Elizabeth Leek, and the following living children: James A. Leek, A. D. Leek, M. M. Leek, Tennessee Colvert, wife of J. E. Colvert, Sallie Rhea, a widow, Nancy Frazer, a widow, and two sets of grandchildren, who were the children of his deceased daughter, Louisa Howington, and his deceased son, Isaac Leek.

The will was duly admitted to probate, and, by it, he left a tract of land to each of his children, and to the children of his deceased children. He also gave to his wife, Elizabeth Leek, one-half of his personal property and one-half of the home place, and to his son, M. M. Leek, the other half of his personal property absolutely and the other half of the home place for life, with remainder to his children.

James A. Leek, Tennessee Colvert, and the children of Isaac Leek declined to claim under the will, and filed their bill in the Chancery Court against the widow, Elizabeth Leek, and M. M. Leek, and the other heirs, claiming that the greater portion of the property disposed of by said will did not belong to the testator, Thomas Leek, individually, though the title was in his name, but

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to a partnership, composed of five members, each owning an equal amount, namely, the testator, Thomas Leek, James A. Leek, Tennessee Colvert, M. M. Leek, and the children of Isaac Leek. This bill was answered by M. M. Leek and the widow, Elizabeth Leek, in which they sought to uphold the will and defeat the claim set up in the original bill.

After a protracted litigation, that cause was finally decided by the Supreme Court in December, 1886. That Court held that all of the property devised was partnership property, and owned by the members above named, excepting property to the amount of eight thousand dollars, the testator, Thomas Leek, having put that amount into the firm, while the other partners had contributed nothing. The cause was remanded for an account of the partnership matters, with directions that there should be first set apart to the estate of Thomas Leek eight thousand dollars, and that the balance of the property belonged, in equal amounts, to the partnership. In place of taking this account, the parties referred the matter to arbitration. In April, 1890, their award was made the judgment of the Court. The eight thousand dollar item was settled in part by crediting it with property valued at \$7,912.50, which originally belonged to the partnership, but had been disposed of by Thomas Leek for his own use. The arbitrators fixed the interest of Thomas Leek in this fund at \$7,063.42. This, however, was an estimated

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value, as none of the real estate had been sold when the award was made. The partnership assets have now been reduced to cash, or its equivalent, and, under the report of the Master, the interest of Thomas Leek's estate in this fund, after deducting from it all proper charges, amounts to \$6,522.69.

The main litigation in this cause is as to how this fund shall be distributed. The award of the arbitrators did not undertake to settle this matter. The only parties interested in the main contention in this case are the widow, Elizabeth Leek, M. M. Leek, James A. Leek, Tennessee Colvert, and the heirs of Isaac Leek. The other children and grandchildren took possession of the property given them under the will, and no question is raised as to their right to same. They are simply made parties in this cause in order to adjust the matter of advancements, should that question arise. In order to have all the matters before the Court, a decree was entered, on January 11, 1892, consolidating all the causes by consent. On August 11, 1892, the causes were tried and decrees entered.

The cause was again heard before the Chancellor touching the rights of the parties to the fund belonging to the testator, which had arisen by the sale of the property which he had devised to Tennessee Colvert, James A. Leek, and the heirs of Isaac Leek, and which they declined to accept; and, on June 10, 1893, a decree was rendered, in which it was adjudged that this fund belonged to

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the estate of Thomas Leek, and must be distributed as if he had died intestate as to same. Touching the rights of Elizabeth Leek and M. M. Leek thereto, the Court decreed as follows: "It appears to the Court, from the will of testator and the decrees of this and the Supreme Court, that the testator attempted to devise a large amount of property, all of which, except \$8,000, belonged to said partnership; and that said will was in great part nullified by the action of Isaac Leek's heirs, Tennessee Colvert, and James A. Leek, at whose suit the partnership was set up, and who refused to accept, and have not received any thing under the will. Mrs. Elizabeth Leek and M. M. Leek sought, in these causes, to have the full amount of their legacies, respectively, given them under said will, paid out of the estate of Thomas Leek, and claimed that the property devised to Isaac Leek, James A. Leek, and Tennessee Colvert, but which they elected not to take, as above set out, should be used in compensating said Elizabeth and M. M. Leek for the deficiency in the devises made to them caused by the election of the above-named parties. The Court, however, decreed that this could not be sustained, since James A. Leek, Isaac Leek, and Tennessee Colvert *had never received any thing under said will.*"

Both parties appealed, and have assigned error, only one of which need be noticed, in the view we have taken of the case.

The appellants assign as error, that the Chan-

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cellor erred in holding that the interest Thomas Leek had in the real estate devised by him to James A. Leek, Tennessee Colvert, and the heirs of Isaac Leek, on their election to claim against the will, should be distributed as the estate of an intestate.

The contention by appellants is that these parties, by their election to claim against the will, defeated, in part, the devises, and the legacies to Elizabeth and M. M. Leek, and the interest so willed to the first-named parties should go to Elizabeth and M. M. Leek, to compensate them for the deficiency in the amount of their devises and legacies, occasioned by the said election of the above-named parties.

Appellees claim that it is not a case of election at all, but that the partners only took their own property, which constituted the bulk of the estate, and the will must, therefore, be treated as inoperative, as its main provision has failed, and the fund in controversy must be distributed as that of an intestate.

The logic of the Chancellor's decree is that, if the heirs who elected to claim against the will, had received any property under the will, they must refund it in order to make up the legacy to Elizabeth and M. M. Leek; but, if they have not received it, then they can now receive it as heirs, and it cannot be taken to make up the deficit in other legacies caused by their election.

We think this is clearly a case where the devisee

is put to his election to take under the will or contrary to it. If they had taken under the will, they must have received the undivided one-fifth interest of Thomas Leek in the respective tracts allotted them, in addition to their own shares. This may or may not have been more than their shares in the partnership. It is evident, therefore, that he gave a portion of this partnership property to Elizabeth and M. M. Leek, to which the other parties were entitled, and, at the same time, he gave to the several parties property which was his own interest in the partnership and not theirs. These heirs and partners were thus placed in position to elect whether they would take under the will or take their shares in the partnership and relinquish the share of Thomas Leek in the partnership, which he proposed to give them under the will.

They elected to take what belonged to them outside of the will, and thus they set free the share of Thomas Leek in the partnership. This being the case, we think the law is, that no part of this fund can go to them as heirs, under the will, until the deficiencies in the other legacies, caused by their election, have been made up.

Mr. Pomeroy, Sec. 517, states the general doctrine as follows: "If the legatee elects to claim against the will, he, thereby, retains his own property, and must compensate the disappointed donee out of the estate given to himself by the donor. A Court of Equity will then sequester the benefits

intended for the electing beneficiary, in order to secure compensation to those persons whom his election disappoints."

Judge Story, at Secs. 1082-3, Equity Jurisprudence, states the doctrine thus: "In the actual application of the doctrine of election, Courts of Equity proceed upon principles which are totally incapable of being enforced in the like manner by Courts of Law. Thus, for example, suppose a case of election under a will which disposes of other property of a devisee, and the devisee should elect to hold his own property, and renounce the benefits of the devise under the will, or (as the compendious phrase is) should elect to claim against the will; in such a case, it is clear that the party disappointed of his bequest or devise by such an election, would, at law, be wholly remediless. The election would terminate all the interest of the parties, respectively, in the subject-matter of the devise to them. The election to hold his own estate, would, of course, maintain the original title of the devisee, and his renunciation of the intended benefit in the estate devised to him, would leave the same to fall into the residuum of the testator's estate as property undisposed of.

"But the subject is contemplated in a very different light by Courts of Equity; for, in the event of such an election to take against the instrument, Courts of Equity will treat the substituted devise, not as an extinguished title, but as a trust in the devisee for the benefit of the disappointed

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claimants, to the amount of their interest therein; or, as it has been well expressed, they will assume jurisdiction to sequester the benefit intended for the refractory donee in order to secure compensation to those whom his election disappoints."

In a note to the case of *Gretton v. Haward*, 1 Swanston, 409, a vast number of authorities are collated, closing with the following clear statement of the principle: "If the will is in other respects so framed as to raise a case of election, then not only is the estate given to the heir under an implied condition that he shall confirm the whole of the will, but, in contemplation of equity, the testator means, in case the condition shall not be complied with, to give the disappointed devisees, out of the estate over which he had a power, a benefit correspondent to that of which they are deprived by such non-compliance. So that the devise is read as if it were to the heir absolutely if he confirm the will; if not, then in trust for the disappointed devisees as to so much of the estate given to him as shall be equal in value to the estates intended for them."

The doctrine is thus laid down in 2 Jarman on Wills, page 1: "The doctrine of election may be thus stated: That he who accepts a benefit under a deed or will, must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it. If, therefore, a testator has affected to dispose of property which is not his own, and has given

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a benefit to that person to whom the property belongs, the devisee or legatee accepting the benefit so given to him, must make good the testator's attempted disposition; but if, on the contrary, he chooses to enforce his proprietary right against the testator's disposition, equity will sequester the property given to him for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of his rights.

"The doctrine specially applies when the owner of an undivided share devises the property by words of description or donation imputing an intent to give the entirety. Then a case of election is raised against the other co-owner who receives a benefit under the same will."

See doctrine discussed in 1 Pomeroy, Sec. 489, and it applies to the heir as well as to a stranger. Story's Eq., Sec. 1094; *Schley v. Collins*, 13 L. R. A., 567.

We are unable to agree with counsel for appellees that the effect of this action on the part of the dissenting devisees resulted in rendering the will nugatory, and that this interest of Thomas Leek should be divided among his children as if he had died intestate.

The cases cited in *Wendel*, 14 and 16, are not applicable. There the will failed because its main provisions were illegal, and the others were clearly dependent upon them. In such case the property attempted to be disposed of fell back into the estate as property undisposed of, and, as the provisions

were mutually dependent, the whole will must fail. Here the legacies and devises are specific and independent, and the will fails not because it is illegal or invalid, but because of the action of the dissenting devisees in withdrawing from it property assumed to be conveyed by it. In the one case, the main provision of the will was inoperative because illegal, but, in this, it is inoperative as to a portion of the property, because rendered so by the devisees themselves.

It would take a very plain case to set aside a will in this way, when specific devises are made which are independent of each other. In this case many of the devises do take effect and stand, and all of them in fact, except those of the dissenters and the widow and M. M. Leek. It is evident that the testator intended to give the widow and M. M. Leek the home place and other property which he did give them, and we cannot presume that he would have changed this purpose if he had reflected that the other property devised to them would not pass as he directed. If he had known that he did not own this property taken out from his will, he might have still given to his widow and M. M. Leek the same property he did give them.

Without further elaboration, we are of opinion that the Chancellor's decree must be reversed, and the assets in controversy must be applied to compensate Elizabeth and M. M. Leek for the deficit in their legacies, which will more than consume

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the funds, and leaves it unnecessary for us to pass on the other assignments in detail. We think the remainder of appellant's and all of appellee's assignments must be overruled.

The decree is reversed, and cause remanded. Costs will be paid by the dissenting devisees.

OPINION ON PETITION TO REHEAR.

On petition to rehear, the Court delivered the following opinion:

WILKES, J. In this cause a very earnest petition to rehear is filed, and supported by elaborate printed brief and argument, the main point of which is that the Court erred in holding that the present is a proper case to apply the doctrine of election. In order that petitioner's position may be correctly stated, a quotation is made from the brief:

"The doctrine of election never applies, and is never enforced to make good the disappointed legatee, except in cases where the refractory legatee gets something or claims something under the will, out of which he can make good the loss to the disappointed legatee. He must not only get something out of the will, but he himself must, by taking his own property, thereby render the will inoperative as to the disappointed legatee. The Court manifestly understood the doctrine of election to apply, and that refusing to take under the

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will was electing *against* the will; whereas, by all the authorities, to elect *against* the will is to claim a devise or bequest given, and, at the same time, to claim property which belonged to such devisee, which the testator had undertaken to give away to another. The doctrine of election never applies except when the legatee has property given to him by the will and property of his own given away, or attempted to be given away, to another."

The Court differs from counsel in his contention that the doctrine of election never applies except in cases where the refractory legatee actually takes or claims something under the will. On the contrary, when he *elects against the will*, he takes *nothing under it* until after the disappointed legatee is made whole in his legacy. When he elects to *take under the will*, then he *surrenders his own property conveyed by the will*, even though he owns such property independently of the will. Counsel illustrates his position as follows:

"The testator may devise a tract of land which belongs to his son, John, to his other son, William, and, in the same instrument, give John another tract of land. In this, John is put to his election; and that is, he may, of course, keep his own property willed to William. But, on the other hand, he may elect to take under the will. When he elects to take under the will, he must let the devise to William stand, though it was his property willed; or, rather, under the authorities, the law is now settled that, to the extent *only* of his

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legacy, is he required to make good the legacy to William; and this, upon the equitable doctrine that the Court will reform the words of the will, and do justice between John and William as legatees. (See Pomeroy, Vol. I., Secs. 464-467; also Story, Vol. II., Secs. 1078 to 1083, especially 1083.) This is the whole of the doctrine of election. There is nothing else in it."

Now, the case thus put by counsel is when John elects to take *under the will*, in which case the devise to William must stand also. But John may elect to take *against the will*—that is, claim his own property by his superior title. In that event, he can take *nothing under the will*, but must allow the devise intended for him to go over to William as compensation for that which William cannot get under the will.

The mistake of counsel is in forgetting that there may be an election *against* the will as well as *for the will*. This alternative privilege is the ground-work of the doctrine of election. The true statement of the doctrine is that election applies when property of the testator is *attempted* to be given to the devisee or legatee at the same time the testator *attempts* to give away the property of the devisee or legatee to another by will. The devisee or legatee, in all such cases, must elect whether to claim his own property or that given him by the testator; and, when he elects to take the one, he surrenders the other, so far as is necessary to make up the share of any devisee or legatee that

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may thus be diminished or destroyed by his election against the will.

Now, in this case the testator tendered to these partners his undivided one fifth interest in the partnership property which he owned, but coupled it with a gift of the entire property, four-fifths of which he did not own. When the partners elected to hold the partnership property by their paramount title, then they surrendered the interest of the testator in the partnership so far as was required to make up to Mrs. Leek and M. M. Leek, the disappointed legatees, their legacies. They did not become individually liable to the disappointed legatees, because they received nothing under the will.

Counsel is in error in treating the \$6,500 fund as partnership funds, and in stating that Thomas Leek's interest in the same is one-fifth, or \$1,350. On the contrary, the \$6,500 is Thomas Leek's share in the partnership, and the whole of it is his as such share, and it is so shown in the reports and decrees in the cause. It is this fund of \$6,500 which was tendered to the partners by the will, and which they elected not to take, which must go to Mrs. Leek and M. M. Leek to make up their shares; and the partners, having elected not to take it under the will, cannot take it as heirs until after the disappointed legatees are made up their full amounts.

The petition to rehear must be dismissed.

Phillips & Buttorff Mfg. Co. v. Campbell.

PHILLIPS & BUTTORFF MFG. CO. v. CAMPBELL.

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(Nashville. March 1, 1894.)

1. JURISDICTION. *Of Circuit Court to enforce mechanics' lien.*

Circuit Court has not jurisdiction of suit to enforce mechanics' lien, where the amount involved does not exceed fifty dollars.

Code construed: §§ 2747, 4286, 4290, 4898, 4997, 5002 (M. & V.); §§ 1987, 3543, 3547, 4123, 4225, 4230 (T. & S.).

Cases cited and approved: *Brown v. Brown*, 2 Sneed, 437; *Reeves v. Henderson*, 90 Tenn., 523; *Spradlin v. Bratton*, 6 Lea, 685.

2. MECHANICS' LIEN. *What is.*

And the furnishers' lien is, for this purpose, treated as the mechanics' lien.

Cases cited and approved: *Bassett v. Bertorelli*, 92 Tenn., 553; *Cole Mfg. Co. v. Falls*, 90 Tenn., 468; *Reeves v. Henderson*, 90 Tenn., 523; *Green v. Williams*, 92 Tenn., 221; *Lumber Co. v. Thomas*, 92 Tenn., 588.

FROM WILLIAMSON.

Appeal in error from the Circuit Court of Williamson County. W. L. GRIGSBY, J.

HEARN & BERRY for Plaintiff.

W. B. WHITE for Defendant.

CALDWELL, J. This is an action by Phillips & Buttorff Manufacturing Company against Mrs. M. M. Campbell, brought to enforce a mechanic's lien

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for \$37.50, the price of materials averred to have been furnished by the plaintiff to the defendant for the repair and ornamentation of her house. The suit was commenced in the Circuit Court of Williamson County by original summons and attachment.

Defendant demurred to plaintiff's declaration, and, for cause of demurrer, said that the Circuit Court had no jurisdiction of the cause of action stated, because the debt sued for was less than \$50 in amount. The Circuit Judge sustained the demurrer, and the plaintiff appealed in error.

"The Circuit Courts of this State are Courts of general jurisdiction, and the Judges thereof shall administer right and justice according to law, in all cases where the jurisdiction *is not conferred upon another tribunal.*" Code, § 4225. Their jurisdiction is concurrent with that of "Justices of the Peace, to the extent of the jurisdiction of the latter, of all debts and demands on contract *over fifty dollars.*" *Ib.*, § 4230.

The last clause of § 4230 is restrictive, and limits the jurisdiction of Circuit Courts, in respect to "all debts and demands on contract," to sums "over fifty dollars;" it also relates to the last clause of § 4225, to the extent of recognizing "another tribunal" as having jurisdiction of all cases where the matters of litigation are "debts and demands on contract" *not* "over fifty dollars."

"Justices of the Peace have exclusive original jurisdiction of all debts or demands on contract,

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where the amount sued for is fifty dollars or less." History of a Lawsuit (Martin's Edition), page 28.

But it is said, in opposition to the action of the Court below, that the jurisdictional limitation imposed by § 4230 of the Code, is not applicable here, because this suit was brought to enforce a mechanic's lien, and not simply to collect an ordinary debt.

The contention is, that a mechanic's lien can be enforced in a Court of record only, and that the jurisdiction of such Court for such purpose, whether it be the Circuit Court or the Chancery Court, is general, including all cases, without reference to the amount of the debt to be collected.

By Sections 1 and 2 of Chapter 118, Acts of 1845-6, and by statutes prior thereto, a *mechanic's lien* was provided in favor of original contractors (Code, § 1981), and of subcontractors (Code, § 1986), who, under proper employment, placed improvements upon the land of another, or furnished materials to be used therein. That lien, as continued and preserved through subsequent legislation, is the same that plaintiff, as a furnisher of materials, seeks to make available in this case. *Bassett v. Bertorelli*, 92 Tenn., 553-8. Whether plaintiff sues as original contractor or as subcontractor is not disclosed in the imperfect record before us; but that is not material.

It was provided by the third section of Chapter 118, Acts of 1845-6, "that the lien herein given may be enforced by attachment, either at law or in equity."

In 1854, this Court, speaking through Judge Totten, with respect to that provision, said: "We think it clear that *any Court*, having jurisdiction of the matter in litigation, has power also to issue the attachment, as a Justice of the Peace, the Circuit Court or Chancery Court, conforming to its course of proceeding. Being in aid merely of the ordinary remedy by suit, the attachment must follow it, and be issued from the same Court which has jurisdiction of the plaintiff's demand." *Brown v. Brown*, 2 Sneed, 437.

The said third section of Chapter 118, Acts of 1845-6, was carried into the Code without change at § 1987; and that section of the Code was so amended, in 1873, as to read as follows: "This lien shall be enforced by attachment, either in law or equity, or by judgment and execution at law, to be levied upon the property on which the lien is." Acts 1873, Ch. 19, Sec. 1; Code (M. & V.), § 2747.

Such is the law upon the subject at this time, the second proviso of the second section of Chapter 103, of the Acts of 1889, having reference alone to the question of removal introduced by that section.

Under the law, as amended by the Act of 1873, it being the same, as to the proceeding by attachment, as it was before that amendment, we are of opinion that the question of jurisdiction is dependent upon the amount of the debt to be collected, and not upon the fact that the plaintiff

seeks the enforcement of a lien. The lien is but a statutory security for the debt, an incident to it, and it may be enforced in any court of law or equity having jurisdiction of the amount involved. The lien may be enforced in one court or another, according to its jurisdiction of the debt to be collected. Section 4230 of the Code is controlling on the question of jurisdiction in this case, as in any other action based upon debt or other contract. The jurisdiction, as declared by that section, has not been changed by any subsequent legislation.

Besides being carried unchanged into the Code at § 1987, the third section of Chapter 118, Acts of 1845-6, was also carried into the Code, with certain additional words, at § 3543, the whole of that section being as follows: "The mechanic's lien is enforced by attachment at law or in equity, sued out upon bill or petition under oath, setting forth the facts, and proceeded with under the provisions of the preceding chapter."

If the words here added by the codifiers, "bill or petition," indicate that the lien is to be enforced either in the Circuit Court or in the Chancery Court, yet the addition could not have been intended to alter or qualify the scope and meaning of § 1987, which, as we have seen, conferred jurisdiction upon those Courts and upon Justices of the Peace, according to their respective jurisdictions of the debts to be collected.

Moreover, "the provisions of the preceding chap-

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ter," which relate to the *landlord's lien* and its enforcement, authorize a proceeding before a Justice of the Peace. *Spradlin v. Bratton*, 6 Lea, 685.

It may be well to note that Messrs. Milliken & Vertrees, in their compilation, treat the Act of 1873 as having amended § 3543, as well as § 1987, of the Code, and, consequently, omit from their corresponding sections (Code, M. & V., 4286 and 2747), the words introduced by the codifiers in the year 1858.

That the third section of Chapter 118 of the Acts of 1845-6 was not regarded as having changed the jurisdiction of Circuit Courts and of Justices of the Peace, as declared in §§ 4225 and 4230 of the Code, is clear from the language used by this Court in *Brown v. Brown*, 2 Sneed, *supra*, and from the language of that section itself. A Magistrate's Court is a Court of Law. It also has jurisdiction "in equity causes, where the subject-matter does not exceed fifty dollars." Code, §§ 4123 (Subsection 7), 4124.

The jurisdiction of Justices of the Peace to enforce a mechanic's lien is not dependent alone upon the statutes hereinbefore considered. It was expressly conferred by Section 1, Chapter 62, Acts of 1857-8, in the following words:

"*Be it enacted, etc.*, That the mechanic's lien secured by the existing laws may be enforced by suit before a Justice of the Peace for all sums within a Justice's jurisdiction; and when the attachment has been levied on land and a judgment

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rendered, and execution also levied on same, the papers shall be returned to the Circuit Court, there to be proceeded upon as in other cases of levy of Justice's executions on land."

That provision, with a slight change of phraseology, went into the Code at § 3547, and is still in force. For the words "the mechanic's lien secured by existing laws," found in the first line of the original act, the codifiers substituted the words, "the lien of mechanics, foundrymen, and machinists." The change does not alter the meaning. The language in each case was intended to embrace all original contractors and subcontractors coming within the provisions of what was known as *the mechanics' lien law*. The designation "material-man" is not used in any of the statutes. He is embraced in other and more comprehensive words. *Cole Mfg. Co. v. Falls*, 90 Tenn., 468; *Reeves v. Henderson*, *Ib.*, 523; *Green v. Williams*, 92 *Ib.*, 221; *Bassett v. Bertorelli*, *Ib.*, 548; *Lumber Co. v. Thomas*, *Ib.*, 588.

In still another part of the Code a Justice of the Peace is given jurisdiction "to enforce mechanic's lien for any sum within his jurisdiction." Code, § 4123, Subsec. 6. That he had such jurisdiction was assumed, without discussion, in the case of *Reeves v. Henderson*, reported in 90 Tenn., at page 523.

Let the judgment be affirmed.

Kirkman v. Brown.

KIRKMAN v. BROWN.

(Nashville. March 3, 1894.)

1. STATUTE OF LIMITATIONS. *Accidental inclosure and occupation of land not adverse to owner.*

Accidental and unintentional inclosure and occupation of land for the term of seven or more years does not affect the rights of the true owner or invest the possessor with any right whatever to the land or to its possession. To invest the possessor with title or a possessory right, his possession must have been taken and held intentionally and adversely for the requisite term, and in such open and notorious manner that the true owner may be reasonably presumed to have known and acquiesced in it.

Cases cited and approved: Pullen v. Hopkins, 1 Lea, 744; Brock v. Burchett, 2 Swan, 31; Marr v. Gilliam, 1 Cold., 502; Gates v. Butler, 3 Hum., 447.

2. SAME. *Same. Case in judgment.*

Complainants owned a 1,000-acre tract of land, within the boundaries of which was included a 40-acre tract owned by defendants under a confessedly superior title. Defendants undertook to build a house and make inclosures upon their 40-acre tract, but, in doing so, accidentally and unintentionally extended their inclosures over their line in two places, thereby including about one acre of the 1,000-acre tract outside the 40-acre tract. The house was built upon the line of the 40-acre tract, two-thirds being situated accidentally outside of it and on the 1,000-acre tract. The defendants occupied the house and kept up their inclosures for more than seven years, but not claiming or paying taxes on any part of the 1,000-acre tract outside the forty acres. Complainants claimed and paid taxes on the 1,000-acre tract for thirty years.

Held: Defendants acquired no interest in the 1,000-acre tract outside their 40-acre tract, not even a defensive title.

FROM CHEATHAM.

Appeal from Chancery Court of Cheatham County. GEO. E. SEAY, Ch.

Kirkman v. Brown.

C. D. BERRY, JOHN E. & A. E. GARNER, and
J. J. LENOX for Complainants.

R. S. TURNER, JOHN ALLISON, and L. T. COBBS
for Defendants.

McALISTER, J. This is an ejectment bill filed in the Chancery Court of Cheatham County, in which complainants seek to recover the possession of 1,000 acres of land. The bill as originally filed was to prevent waste and to enjoin the defendants from cutting timber from said land.

The Chancellor decreed that the logs already cut came from the land of complainants, but were not cut from the land involved in this controversy. There was a decree in favor of the complainants for the value of the logs, but the Chancellor was of opinion that, in respect to the land claimed by these defendants, their title was perfected by the statute of limitations of seven and twenty years. Complainants appealed, and have assigned errors.

The proof shows that, on March 20, 1840, the State of Tennessee granted to G. W. C. Lovell a tract of 2,781 acres of land, lying in Davidson County. That part of Davidson County is now included in Cheatham County. It further appears that, on March 20, 1840, the said Lovell conveyed this granted land to Hugh and John Kirkman by deed, recorded in the Register's Office of Davidson County. It further appears that, on July 16, 1838, the State granted to Nicholas Hale a tract of forty acres, lying in Davidson County. On July

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7, 1839, the State granted to the defendant, Jo Brown, a tract of 100 acres, and on December 17, 1859, another tract of 1,000 acres, lying in Cheatham County. The grant to Lovell of 2,781 acres embraces within its boundaries the tract of 40 acres granted to Nicholas Hale, the tract of 100 acres, and, substantially, the tract of 1,000 acres granted to Joseph Brown. It is conceded the last three tracts are within the boundaries of the larger tract.

The cardinal inquiry in this case is in respect to the title of the 1,000-acre tract embraced in the last grant. This grant was issued in 1859, but was not recorded until after the present suit was instituted. Defendants insist that their title to the land was perfected by the statute of limitations and their possession of the land for more than seven years under this unregistered grant, which constituted a color of title. It is claimed by defendants that their father built a residence, stables, etc., on the land, and that he and defendants occupied it and cultivated it for more than seven years prior to the filing of this bill.

Jo Brown, the ancestor of defendants, died in 1879, and defendants have lived in his house and cultivated a field partially within the 1,000-acre boundary ever since their father's death.

The contention of complainants is that the land occupied and cultivated by Jo Brown and his sons—who are the present defendants—was the 40-acre tract originally granted to Nicholas Hale and afterwards owned by Parthenia Brown. The latter

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was the mother of Jo Brown, and the proof shows that his house was built with her permission on her 40-acre tract. The evidence of the surveyor, Williams, shows that the house built by Jo Brown in his life-time extended beyond the west line of the 40-acre tract, so that about one-third of the house was inside the 40-acre tract belonging to Mrs. Parthenia Brown, and about two-thirds of said house was over Mrs. Brown's line and on the 1,000-acre tract. It also appears that the field cultivated by Jo Brown and his heirs extended diagonally across the 40-acre tract, and one-quarter of an acre of said field, on the western boundary, was on the 1,000-acre tract. It further appears that about three-quarters of an acre of this field extended beyond the eastern boundary line of the 40-acre tract into the limits of the 1,000 acre tract.

We are of opinion, from an examination of this record, that the possession of Jo Brown and his heirs must be confined to the 40-acre tract; and the fact that his house extended over the west line of the 40-acre tract into the limits of the 1,000-acre tract was merely accidental, and not such an open, adverse, and notorious possession as to bring it within the statute of limitations. The same may be said of the possession of the field outside of the 40-acre tract. This field was always supposed to be entirely within the limits of the Nicholas Hale grant, and its extension one-quarter of an acre on one side, and three-quarters of an acre

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on the other side, into the boundary of the 1,000-acre tract, was merely accidental.

The facts in this record show that Jo Brown intended to build his house on the 40-acre tract owned by his mother, and to cultivate the field as her tenant. Brown never claimed the 40-acre tract as his property, but always declared it belonged to his mother. He made this declaration when the assessor came to assess the land for taxation, and gave it in as the land of Parthenia Brown, to whom it was accordingly assessed. Brown paid no taxes during the time it is claimed he owned it, and exercised no acts of dominion over it, but, on the contrary, during all this time he disclaimed owning *any* land. It is shown in proof that he made this statement to the census-taker who was taking the census for the United States Government in 1870. During all this time, the land in controversy was assessed to complainants, and they have paid the taxes on it from 1860 to the present time. It has already been seen that the grant under which complainants claim is older by many years than that of Jo Brown to the 1,000-acre tract, but the Chancellor held the defendant's title was perfected by an adverse possession of more than seven years. We are of opinion there was no adverse possession of this land in the sense of the statute. The accidental and unintentional inclosure of a small parcel of the land for seven years would not vest a valid title or constitute a possessory right in Jo Brown. If the possession

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was accidental, and not by design, the statute does not apply. *Gates v. Butler*, 3 Hum., 447; 2 Swan, 31; 1 Cold., 502. The possession must be continuous, open, and notorious, for the reason that the law, in giving title by adverse possession, proceeds upon the ground that there has been an acquiescence on the part of the owner of the land. 1 Lea, 744.

The decree of the Chancellor is reversed, and a decree will be entered in favor of complainants for the possession of the land, with costs.

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READ v. TELEPHONE COMPANY.

(*Nashville.* March 8, 1894.)

1. PRINCIPAL AND AGENT. *Agent's powers.*

An agent, with authority implied from a general agency, or expressly conferred, to sell the shares of stock of his principal, has no power to pledge them for his own individual debt or benefit. (*Post*, pp. 488, 489.)

Case cited: 120 U. S., 20.

2. CORPORATIONS. *Unauthorized transfer of stock.*

If a corporation transfers its stockholders' shares upon its books, upon the assignment of the owner's agent, without requiring production or proof of the agent's authority, and the transfer proves to have been unauthorized, the company will be compelled, at the suit of the share-holder, to re-instate him to his rights. (*Post*, pp. 489-491.)

Cases cited and approved: *Caulkins v. Gas-light Co.*, 85 Tenn., 683; *Smith v. Railroad*, 91 Tenn., 230.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
ANDREW ALLISON, Ch.

GRANBERY & MARKS for Complainant.

VERTREES & VERTREES for Defendant.

McALISTER, J. This bill was filed in the Chancery Court of Davidson County by Mrs. Martha

M. Read, of Washington, against the Cumberland Telegraph and Telephone Company, to compel the company to issue to complainant forty shares of its capital stock. The complainant was originally the owner of forty shares of stock of the par value of \$100 per share. It is alleged in the bill that her certificate of stock was in the keeping of one Adolph Dahlgren, who, on May 1, 1891, undertook to assign the same to Thos. S. Marr, by signing complainant's name to a transfer thereof, as her agent and attorney, and that defendant corporation undertook to transfer this stock on its books to said Thos. S. Marr. Complainant further alleges that Dahlgren was not authorized by her to make this sale and transfer. She alleged that the attempted transfer was without her knowledge or consent, and, as soon as it became known to her, she notified defendant corporation that the act of said Dahlgren was unauthorized, and disaffirmed it. Complainant prayed that defendant issue a certificate to her as evidence of her rights as a shareholder in said corporation, and that she have a decree for the accrued dividends on said stock since May 1, 1891.

The defendant answered, and, among other things, averred that complainant was well acquainted with all the facts at the time; that she knew that said Dahlgren had transferred and indorsed said certificate; that she had authorized it to be done, and, with full knowledge thereof, ratified and affirmed the same; that with full knowledge of all the

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facts, as above stated, the complainant had had a final settlement with her agent, Mr. Dahlgren, and ratified and affirmed what he had done. It denies that the transfer, when made by Mr. Dahlgren, was made without the knowledge or consent of complainant, and avers the fact to be that Mr. Dahlgren was her agent and attorney, and clothed by her with full power and authority to transfer and assign the same and to collect all dividends declared thereon. It denies that complainant has never parted with her stock, and avers that she sold and assigned the same to Thomas S. Marr. It denies that the stock has continued to be hers since the sale and transfer thereof to said Marr, and denies that she is entitled to any dividends since said sale thereof to him. It denies that it owes complainant any thing whatever, and avers that it has paid all dividends declared on said stock to the rightful owners and holders thereof. It avers that she is estopped to deny the authority of her agent, Dahlgren, to transfer and assign said stock, by reason of her own conduct in clothing him with full authority to act for her as her general agent and attorney in fact, and in making a settlement with him with knowledge of these facts.

The Chancellor rendered a decree in favor of complainant on October 31, 1893. He decreed as follows: "That complainant be restored to all her rights as a stockholder in defendant corporation, and that defendant corporation hereafter rec-

ognize her as such stockholder, and that it issue to her a proper stock certificate showing her ownership of said stock, and that it pay over to her all dividends declared thereon after May 1, 1891, which have not heretofore been paid complainant. It is further ordered that defendant pay the costs of this cause, for which let execution issue."

Defendant appealed, and has assigned the following errors:

First.—The evidence shows that the certificate of stock issued to complainant was sold and transferred to Thos. S. Marr, in her name, by A. Dahlgren, as her agent and attorney; and that Mr. Dahlgren had authority from her to make the said sale and to transfer the said stock.

Second.—The evidence shows that complainant constituted Mr. A. Dahlgren her general agent and attorney to transact all business at Nashville, Tennessee, for her in her room and stead; and their general course of dealing was such as to warrant the defendant in dealing with Mr. Dahlgren as her general agent, with power to act for her in as full a manner, with respect to all matters at Nashville, as she could act in person.

Third.—The Court erred in sustaining the exception made by complainant to the answer of A. Dahlgren to the sixteenth interrogatory propounded to him, and in excluding his said answer to any part thereof. made to said interrogatory, because the answer of the said witness to the interrogatory propounded to him, and his whole answer

thereto, is responsive to the question, relevant to the issues, and competent evidence.

Fourth.—The evidence shows that complainant ratified and approved the sale and transfer of the said stock sold and transferred by Mr. Dahlgren; and that she ratified the said sale and transfer after the same had been made by said Dahlgren, and with knowledge of all the facts with respect thereto.

Fifth.—The evidence shows that complainant has estopped herself, by her own conduct, from denying the authority of Mr. Dahlgren to sell and transfer said stock in her name as her agent and attorney.

Sixth.—The evidence shows that complainant authorized the sale and transfer of said stock to be made by Mr. Dahlgren as her agent and attorney; and that she directed and authorized him to invest the proceeds thereof in real estate in Chicago, Ills., which was done by him; and the land deeded to her, bought with the proceeds of the sale of said stock.

It is important to understand at the outset what the transaction between these parties really was. It appears that the stock in controversy was originally purchased by Adolph Dahlgren for Mrs. Read, and with funds belonging to her. The certificate of stock was kept by Dahlgren for some months, when he sent it to Mrs. Read. Mrs. Read then retained possession of the stock for several years, when she returned it to Dahlgren for

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the purpose, as stated by her, "in case there came a suitable time, I wanted it sold, but I never told him to do that." Dahlgren kept it until May 1, 1891, when he pledged it to Thos. S. Marr, as collateral to secure an individual loan of \$1,200. The certificate was indorsed to Thos. S. Marr, in the name of "Mrs. M. M. Read, by A. Dahlgren, agent and attorney." Marr immediately sent this certificate to the telephone office to be transferred to him on the books of the company, but his agent was informed by Mr. Caldwell, the president, that the stock could not be transferred without a power of attorney from Mrs. Read.

It appears, however, that, at this time, Dahlgren was in Chicago, and was represented in Nashville by Lindsley. Mr. Lindsley had negotiated the loan from Thos. S. Marr for Dahlgren upon the hypothecation of the telephone stock. When, therefore, Caldwell, the president of the telephone company, refused to transfer the stock, Mr. Lindsley was requested to see him on the subject. Mr. Lindsley asked Mr. Caldwell what was the matter with the stock, and Mr. Caldwell told him he could not transfer the stock without the power of attorney. After some conversation, Lindsley told Caldwell that stock had been transferred on previous occasions, and that Mr. Dahlgren's power of attorney had then been given to the company, and that the company had it on file. Mr. Caldwell said they knew nothing about it. Mr. Lindsley remarked: "Well, you have it, and I say to

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you it will be all right to make the transfer." Then Mr. Caldwell said: "If you say it is all right, I will make the transfer." It was then transferred to Thos. S. Marr on the books of the company.

It appears that default was made by Dahlgren in the payment of the loan from Marr, and the stock was sold for the satisfaction of Marr's debt. There was a small surplus from the sale after satisfying the debt, which was paid over to Dahlgren.

It is insisted, on behalf of the telephone company, that Dahlgren was the general agent of Mrs. Read at Nashville; that he was authorized to act for her in as full and complete a manner as she could have acted in person, and, in addition to his general authority as an agent, that Dahlgren was specifically directed to sell the stock involved in this controversy. The authority of a general agent is measured by the usual scope and character of the business he is empowered to transact, and for any act done by him which is natural and customary in the management of such business, the principal is bound. If it be conceded that Dahlgren was constituted a general agent for Mrs. Read to transact her business in Nashville, and, moreover, was specifically empowered to sell this telephone stock, would such authority carry with it the right of the agent to hypothecate the stock for the security of his individual indebtedness? An agent to sell goods,

though being the apparent owner by reason of having possession by permission of the principal, cannot pledge them for his own debt. James on Pledges, 372. An authority to sell or transfer stock for a principal does not authorize the agent to transfer it by way of security for his own private debt, for it is not an ordinary exercise of such authority. Story on Agency, 78. An agent authorized to manage and carry on his principal's business has no implied authority to pledge or mortgage. Mechem on Agency; *Allen v. Bank*, 120 U. S., 20.

It is admitted by counsel for defendant that an agent who is authorized to sell would not possess the implied authority to pledge the stock so as to give to the pledgee a right to hold it as against the principal; but it is insisted that no such question arises in this case; that this is not a controversy between the pledgee of the stock and the principal; that the stock was not pledged at the time this suit was brought. It is admitted that Dahlgren did pledge it, but he afterwards ordered it sold in satisfaction of the pledge. The argument is, the fact that it had once been pledged cannot affect the legal question, and the case is to be treated now as though the stock had been sold in the first instance, and transferred upon the books of the company.

We cannot concur in this view of the case. So far as the record discloses, this stock was never transferred but once, and then to Thomas S. Marr,

the pledgee, with whom it had been deposited as collateral security for a loan to Dahlgren. The fact that the pledgee afterwards sold the stock for the satisfaction of the debt, although sold with the consent and by the direction of Dahlgren, cannot bring such sale within the scope of Dahlgren's agency. We are dealing now with the transfer of complainant's stock by the defendant company to Thomas S. Marr, the pledgee of Mrs. Read's agent. The case, therefore, must turn upon the authority of Mrs. Read's agent to pledge this stock, and his authority to direct a transfer of the stock on the books of the telephone company to Thomas S. Marr, his pledgee.

In *Cook on Stockholders*, 398, the rule is stated that its own safety requires that a corporation be satisfied of the right of a person proposing to make a transfer of stock to do what he proposes. *Caulkins v. Gas-light Co.*, 1 Pickle, 683. In the case of *Smith v. Railroad Co.*, 7 Pickle, 280, it was held, viz.: "The fact that stock is assigned by one other than the one to whom it was issued, devolves upon the corporation, when called upon to transfer the shares and issue a new certificate, the duty of inquiry as to the power of the assignor to make the assignment. It made no inquiry. It assumed, therefore, the risk as to the power of the assignor to dispose of the stock."

In the case now being adjudged, it appears that the president of the telephone company, when requested to make this transfer, was not misled by

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any ostensible power that seemed to be vested in Dahlgren. Caldwell declined to recognize his authority, and expressly refused to make a transfer of the stock without a power of attorney from Mrs. Read. The president of the company was at last induced by Mr. Lindsley to make the transfer, and made it alone upon his personal guarantee and assurance that it was all right. This, therefore, is not a case where the company can seek protection under any apparent authority with which the agent was clothed by his principal. The case must turn upon the actual authority possessed by the agent to make the pledge and transfer. Conceding that Dahlgren was the general agent of Mrs. Read in Nashville, and acted for her in loaning out money, in making investments, in purchasing stock, and in conducting her financial transactions, and admitting that he was expressly empowered, or specifically directed, to sell this stock, all this authority added together would not authorize Dahlgren to make a pledge of this stock for his individual indebtedness. The company, in this case, was put upon inquiry, and had knowledge, or at least competent means of knowledge, that Dahlgren had pledged the stock for his own benefit. This disposes of the principal question presented in the record. Other assignments have been considered, but, in the opinion of the Court, they are not well taken.

The decree of the Chancellor is affirmed.

Telegraph and Telephone Co. v. Electric Railway Co.

THE CUMBERLAND TELEGRAPH AND TELEPHONE CO. v.
THE UNITED ELECTRIC RAILWAY CO.

(Nashville. March 11, 1894.)

1. ELECTRIC STREET RAILWAYS. *Constructed and operated upon streets are not additional burden upon fee.*

An electric street railway, constructed and operated by means of an overhead trolley wire supported by poles, with the permission of the public authorities, for the transportation of passengers only, and conforming its track to the surface of the ground, is not an additional servitude upon the fee within the street, but a legitimate use of the streets within the purpose of their original dedication. But this principle does not extend to property rights outside the streets, which are subjected to loss or burden by reason of the extraordinary incidents attending the operation of such railways, and which were not contemplated or compensated for in the original dedication of the streets to public use. (*Post*, pp. 502-505.)

Judges Wilkes and Bright dissenting.

Cases cited: 2 Am. R. R. & Corp. Cas. (R. I.), 44; 6 Am. R. R. & Corp. Cas., 335; 47 N. J. Eq., 380; 3 Ohio Cir. Ct. R., 425; 85 Mich., 634; 12 L. R. A. (Ohio), 534; 139 Pa. St., 419.

2. SAME. *Is ordinary use of streets.*

An electric street railway whose lines are constructed and operated in such manner as to constitute a legitimate use of the streets, and to impose no additional burden upon the fee, is an "ordinary use" of the streets, which telephone and other like companies are forbidden to obstruct by the terms of the statute authorizing them to occupy the streets. (*Post*, pp. 502-505.)

Judges Wilkes and Bright dissenting.

Act construed: Acts 1885, Ch. 66.

3. ELECTRIC STREET RAILWAYS AND TELEPHONE COMPANIES. *Their status and rights upon the streets.*

The rights of electric street railway companies, and of telephone companies, to construct and operate their lines upon the public streets are, under our statutes, co-ordinate. Each is independent of the other within its own sphere. Neither is subservient to the other,

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though the sphere of telephone companies is circumscribed by the condition that they shall not obstruct the ordinary use of the streets. Each must exercise its powers with a careful and prudent regard for the other's rights. Both are *quasi* public corporations, deriving their rights and franchises from the same source, and exercising them by the same authority. They are equally indispensable to the public, and should exist under conditions equally favorable to the accomplishment of the purposes of their creation. (*Post*, p. 502.)

Acts construed: Acts 1885, Ch. 66; Acts 1887, Ch. 65; Acts 1889, Ch. 49.

4. SAME. *Conflict of poles and wires.*

An electric street railway company whose lines are constructed and operated in such manner as to constitute an "ordinary use" of the streets, is nevertheless liable to a telephone company for the damages inflicted, where the railway company enters upon a street, one side of which is already occupied by the poles and wires of the telephone company, and, by erecting its poles on both sides of the street, when one side would have sufficed, necessitates the change and removal of the poles and wires of the telephone company. (*Post*, pp. 500, 501, 505.)

5. SAME. *Damages caused by induction or parallelism.*

An electric street railway whose lines, constructed and operated in such manner as to constitute an "ordinary use" of the streets, are parallel to the pre-existing lines on the same streets of a telephone company, both companies using the earth as a return conductor, is not liable for damages inflicted upon the telephone company by those electrical disturbances attending such parallelism, known as "induction." The occupation of the streets by telephone companies is upon condition that they shall not obstruct the "ordinary use" thereof. Liability for consequences of induction obstructs the railway's free use of the streets. The telephone company's damages therefore result from its own wrongful act. (*Post*, pp. 499, 500, 505, 506.)

6. SAME. *Damages caused by conduction or leakage.*

An electric street railway, lawfully constructed upon the streets, and, in its operation, using the earth as a return conductor, according to an approved system, and producing non-natural electric conditions on and beyond the limits of the streets by reason of its collection and discharge into the earth of large and unusual quantities of electricity, must compensate a pre-existing contiguous telephone plant, constructed according to a long used plan, and also using the earth as a return conductor, but causing no disturbance of ordinary electric

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conditions anywhere, for damages inflicted upon it by the process known as "conduction" or "leakage," where the telephone exchange is located, and the telephone wires are grounded, on private properties outside the streets, and are there invaded and injured by the excess of electricity thrown off in the operation of the railway. (*Post*, pp. 498, 499, 506-526.)

7. SAME. *Same. Expense of putting in "McLeuer Device."*

The "McLeuer Device," a large copper wire, attached at both ends to the outgoing telephone wires, and constituting a return conductor, being the cheapest effective remedy for injury by "conduction," and capable of being applied alone by the telephone company, it is the right and duty of such company to resort to said "Device" for its own protection against loss by "conduction," and it may recover the cost of the same of the railway company. (*Post*, pp. 499, 524-526.)

8. TELEPHONE COMPANIES. *Use of streets.*

By the terms of the statute granting telephone companies the use of the streets, they are forbidden to obstruct their "ordinary use" by others. This limitation does not attach, however, to the use of their properties outside the streets. (*Post*, pp. 507, 508.)

Act construed: Acts 1885, Ch. 66.

9. SAME. *Rights and franchises not revoked by statutes for benefit of street railways.*

The statute conferring franchises upon telephone companies is not repealed by implication by later statutes conferring franchises upon street railway companies. Repeals by implication are not favored. Repugnancy between statutes must be plain and unavoidable, or a later statute will not operate to repeal an earlier one. (*Post*, p. 508.)

Acts construed: Acts 1885, Ch. 66; Acts 1887, Ch. 65; Acts 1889, Ch. 40.

10. CORPORATIONS. *Revocation of franchise.*

Although the Legislature has power to revoke the franchises of a foreign corporation, and, since the Constitution of 1870, those also of any domestic corporation, yet this power cannot be exercised in a manner that would operate as a confiscation of the properties of such corporations for the benefit of others. And revocation of such franchises will not be presumed, but must appear by the clearest expression of the legislative intent, especially where corporations have made large investments upon the faith of these grants. (*Post*, pp. 508, 509.)

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11. EMINENT DOMAIN. *What is a taking of property.*

The injury by "conduction" is a taking of the property of the telephone company by the street railway company, within the constitutional provision requiring compensation to be made for private property taken for public use. It imposes a burden upon telephone company's property that impairs its use and value. The loss is fixed and definite in amount. It makes no difference that no material thing was taken, or that the loss resulted, not from contact of material things, but through the agency of the subtle and impalpable electric fluid. The important consideration is that a thing of value has been taken from the telephone company for the benefit of the street railway company, as the representative of the public, and for that thing compensation must be made. (*Post*, pp. 510-524.)

12. SAME. *Same.*

Loss by conduction is not to be classed as a mere "inconvenience" or "consequential injury," that must be borne without compensation, as a common burden for the public benefit. (*Post*. pp. 522, 523.)

FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson County. W. K. McALISTER, J.

VERTREES & VERTREES for Plaintiff.

EAST & FOGG and J. C. BRADFORD for Defendant.

G. W. PICKLE, Sp. J. This is a suit by a telephone company against an electric street railway company to recover damages inflicted upon the telephone plant by the contiguous railway plant. The plaintiff has appealed from an adverse judgment and assigned errors.

The facts are practically undisputed, and, so far as they are material or pertinent to the questions to be determined, are as follows: The plaintiff, a Kentucky corporation, had, prior to 1889, established, in the city of Nashville, a telephone plant upon the "single wire" plan or system. The earth, under this system, is used as the return conductor to complete the electrical circuit, and the overhead "single wire" must have earth connections at both ends, at the "exchange" and at the subscriber's. These earth connections of plaintiff's wires were effected upon private property at both ends, upon the company's property at the "exchange," and upon the subscriber's property, by his consent, at the other end. The poles, upon which plaintiff's wires were stretched, were planted in the public streets by permission of the City Council, and by authority of a general statute of this State which empowers telephone and other like companies, both foreign and domestic, to construct, operate, and maintain, upon consideration of certain benefits conceded to the State and general government, their lines "along and over the public highways and streets of the cities and towns of this State; *Provided*, That the ordinary use of such public highways, streets, etc., be not thereby obstructed." Acts 1885, Ch. 66.

In telegraphy, of which telephony is but another form, it has been universal practice for half a century to use the earth as the "return circuit."

The plaintiff's plant was constructed in accordance

with an approved system, and the one chiefly used in all the large cities of the United States.

The electric currents required and used in the operation of plaintiff's plant cause no hurtful disturbance anywhere of natural electric conditions.

The plaintiff's plant, thus constructed, was in perfect condition and successful operation, rendering satisfactory service to its patrons, when, in 1889, the defendant, a domestic corporation, having obtained control of the street railways of Nashville, which had, with one unimportant exception, been operated by horse power, constructed and put into operation thereon a "single trolley" overhead electric railway system.

Defendant's action in this particular was authorized by general public statutes of the State, which provided that street railway companies that had hitherto used animal power for the operation of their cars, might, with consent of the city authorities, adopt electricity as a motive power. Acts 1887, Ch. 65; 1889, Ch. 40. The required consent of the city authorities was obtained by defendant.

While there are two systems of electric street railways, the "single trolley" system and the "double trolley" system, the former is the more approved and satisfactory, and the one in general use. It is better adapted, than the "double trolley" system, to single track railways like defendant's. It is likewise cheaper.

The defendant's plant was properly constructed

and equipped according to the "single trolley" system.

The earth is used as a "return circuit" in the operation of street railways constructed upon the "single trolley" plan, but not for those operated upon the "double trolley" plan.

The defendant, in the operation of its plant, generates or collects electricity in such unusual quantities, and applies and uses it in such violent, turbulent, and varying currents, as to produce a non-natural and disturbed condition electrically, not only within the streets, but for the distance of half a mile on either side.

The plaintiff's entire plant was, for a time, paralyzed, and its utility destroyed, by the construction and operation of defendant's plant or system. The injuries, so fatal to plaintiff's franchise and plant, resulted by several methods that it is important to describe.

First.—Injury resulting from what is known as conduction or leakage. Currents of electricity of great strength and force are generated and applied by defendant, in the propulsion of its cars. These abnormal currents of the electrical fluid are poured out or permitted to escape into the streets. They overflow the streets and invade private property for half a mile on either side, and, finding the earth connections of the telephone wires at the exchange and at the subscriber's, pass up into those wires and the telephone instruments, and, by reason of their great force and volume, substantially

destroy the utility of the telephone plant. This interference can be obviated in only one way—viz., by a metallic “return circuit” for one of the plants. The only metallic “return circuit” for a railway yet discovered is that known as the “double trolley” system. The “double trolley” system is more expensive than the “single trolley” system, and inferior in other respects for the operation of single-track railways.

A recent invention, known as the “McLeuer Device,” has been proved by experience to be an effective remedy for the disturbances caused by conduction. This “McLeuer Device” consists of a large copper wire, supported on poles, with which the outgoing telephone wires are connected at both ends, and which serves as a “return circuit” instead of the earth. The “McLeuer Device” is the most effective and least expensive remedy that has been discovered for the disturbances caused by conduction. The plaintiff was compelled, in order to reclaim its plant, to put in this “McLeuer Device,” at a cost of \$3,660.58.

Second.—Injury resulting from what is called induction or parallelism. The wires of the telephone company and of the railway company are parallel upon some of the streets.

It is a physical fact of much importance in electrical mechanism that, when two wires of two circuits are parallel to each other, and there is a current of varying intensity on one of them, this will produce in the other, in the opposite direc

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tion, a current of electricity of similar variation. The amount of induction depends upon variation in current, the distance of the wires from each other, and the length of the parallelism of the wires. The current upon the trolley wire and the feed wire of the railway is quite variable in quantity and intensity, owing to the drain upon the store of the electricity by the moving and stopping of the car. Nor is the electricity, as generated, exactly uniform in its flow from the dynamo. The result is, wherever the telephone wire is parallel with the trolley wire and feed wire, there is induced upon the telephone wire a current whose variation corresponds with the variations of the electrical current on the electric railway wires, thereby producing such disturbances as render the use of the telephone plant impracticable. But one practicable remedy has been discovered for the disturbances caused by induction; that is, to destroy the parallelism of the wires of the two circuits. This remedy is practicable for the telephone company alone. The expense incurred by plaintiff on this account was \$856.30.

Third.—The plaintiff expended \$816 in putting up higher poles on Main Street, in consequence of conflict produced by the erection of defendant's poles and wires. The plaintiff's poles occupied one side of Main Street, and defendant's poles were put up on both sides of said street, and conflicted with plaintiff's poles and wires so as to

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render it necessary for plaintiff to put in new and higher poles.

The majority of the Court think the defendant could have reasonably avoided this conflict by supporting its wires upon a single line of poles, with arms, erected through the middle of the street, or upon the opposite side from the telephone poles and wires. Judge Snodgrass and the writer of this opinion do not concur in this finding of fact.

The contention of the parties will be stated and disposed of in order, and so much of the Court's charge as may be deemed material will be stated in the proper connections.

The fact that plaintiff sustained loss in consequence of the construction and operation of defendant's plant is admitted by defendant. The amount of that loss is accurately ascertained, and is not a matter of controversy. The sole question for determination is defendant's liability for that loss. The loss by conduction is distinct from that resulting from induction, and from conflict of the poles and wires of the two systems. The two items last named, loss by induction and by conflict of poles and wires, may be conveniently considered together as involving the same or similar questions. But loss by conduction will be considered apart from other matters.

First.—Is defendant liable for loss that plaintiff sustained from induction and from conflict of the poles and wires of the two systems? This loss,

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unlike that caused by conduction, occurs upon and within the streets, and is a direct and immediate result of plaintiff's occupation and use of the streets simultaneously with defendant.

It is important to ascertain the exact status and relative rights of these companies as regards their use and occupation of the public streets. Both are *quasi* public corporations of the same general character. Both serve important public ends and needs, and are equal candidates for public favor. Both derive their rights and franchises from the same source—a public general statute—and exercise them by permission of the same city authorities. The Legislature intended that both should continue to exist under conditions favorable to the accomplishment of the purposes of their creation. No purpose to sacrifice one for the benefit of the other is apparent. It is therefore not quite accurate to say that defendant has the dominant, and plaintiff a subservient, use of the streets. Their respective rights to occupy and use the streets are co-ordinate. Each, within its own sphere, is independent of the other. The defendant's right is to use the streets for the erection and operation of an electric railway. Acts 1887, Ch. 65; Acts 1889, Ch. 40. And this, it is insisted, is a strictly legitimate and ordinary street use. The plaintiff's right is to use the streets incidentally in the erection and operation of a telephone plant, with the proviso that the ordinary use of the streets be not thereby obstructed.

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It is perfectly clear that no conflict can occur between these companies in the use of the public streets, if each shall remain within its proper sphere and exercise its powers with that careful and prudent regard for the rights of the other which the law enjoins. The defendant must exercise care and prudence to avoid injury to plaintiff, and plaintiff must not obstruct defendant's use of the streets, if that be an "ordinary use." Is an electric street railway an ordinary use of the streets? There can be no substantial distinction between an ordinary and a strictly legitimate use of the streets.

With rare unanimity the Courts have concurred in holding that an electric street railway, constructed and operated upon the streets by means of an overhead trolley wire supported by poles, with permission of the public authorities, for the transportation of passengers only, and conforming its track to the surface of the ground, is not an additional servitude upon the fee within the streets, but a legitimate use of the streets within the original general purpose of their dedication. 2 Am. R. R. & Corp. Cas. (R. I.), 44; 47 N. J. Eq., 380; 3 Ohio Cir. Ct. R., 425; 85 Mich., 634; 12 L. R. A. (Ohio), 534; 139 Pa. St., 419; 6 Am. R. R. & Corp. Cas., 335. Streets were designed to afford facilities for the inter-communication of the multitudes of people assembled within cities and towns. New and improved methods of travel, devised to meet the growing demands of increased population and sub-

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urban life, are within the original general purpose for which streets were created.

Electric street railways, constructed and operated as stated, are but a modern and improved use of the streets as public ways, affording, without considerable public inconvenience or obstruction of other proper use of the streets, the facilities for cheap, rapid, reliable, and convenient transportation, so essential to the population of large cities and their suburban additions. The growth and extension of cities must have been contemplated when the streets were established. Such use of the streets, whether new or old, as would best accommodate the increased population must have been likewise contemplated. That the electric railways use the streets only by statutory permission or regulation, cannot affect the question, as the Legislature may undoubtedly regulate the ordinary use of streets. The objections urged against the electric railway would exclude the horse car and the cable car; and the result would be to magnify the abutter's insignificant interest in the fee into an importance and value never contemplated by either party, and to subject the public to the burden and inconvenience of making new condemnations of the fee upon the introduction of any new and improved method of using the streets. We hold the electric street railway a legitimate use of the street, within the original general purpose of dedication, and therefore an ordinary use. This seems to have been the common understanding hitherto of the

Legislature, the street railway companies, the general public, and the legal profession. We do not hold, and must not be understood as holding, that the electric railway companies may, without making compensation, accompany such ordinary use of the streets with such extraordinary incidents as impose new or additional burdens upon properties outside the streets that were not, and could not have been, contemplated and compensated for in the original taking. The differences between a dummy line and an electric street railway are so palpable as to require no enumeration. Judges Wilkes and Bright do not concur in the conclusion that electric street railways are an ordinary use of the streets.

By whose negligence or fault has plaintiff sustained the loss under consideration? Clearly, upon the facts as found by the majority, the loss caused by conflict of poles and wires is imputable to defendant's fault or want of care. Having power to have avoided this conflict without injury to its plant, it was defendant's duty to do so. The conflict was the result of defendant's unnecessary act. On the other hand, the loss by induction cannot be imputed to any fault or negligence of defendant. Its plant was, as regards this matter, properly constructed and operated. Defendant could not obviate induction without abandoning the streets where it occurred. Induction is such obstruction of the streets as plaintiff is forbidden to create.

The objection that induction is not an obstruc-

tion of the streets "sticks in the bark." True, it did not arrest the construction and operation of defendant's plant, but that results not for the reason that induction is not an obstruction, but because defendant was sufficiently powerful to disregard and override it.

A child upon defendant's track, in front of its moving car, is not, in a strict sense, an obstruction, but who will say that the fact does not seriously interfere with defendant's free and unembarrassed use of the street. The constraint caused by liability for legal penalties, if the child is crushed, operates as a very substantial obstruction. Defendant must stop the car or incur serious liability. It is in vain to say that induction is not an obstruction, if defendant shall be held for the unavoidable damage caused by it. It is true, induction implies no physical contact of the two plants, but it is a direct and immediate result of plaintiff's use and occupation of the streets. The presence and position of plaintiff's poles and wires upon the streets cause induction, and their removal would obviate it. The plaintiff cannot recover for the loss sustained from induction. It results from his unlawful obstruction of defendant's use of the streets. The consideration of other questions is irrelevant in this connection.

Second.—Is defendant liable for loss sustained by plaintiff from the effects of conduction? The loss by conduction, unlike that caused by induction, does not result from plaintiff's obstruction of de-

fendant's use of the streets for an ordinary purpose. This interference would occur, and cause precisely the same loss to plaintiff, and in precisely the same manner, if plaintiff had no poles or wires upon the streets. Loss by conduction does not result in the slightest degree from the presence of plaintiff's poles and wires upon the streets, and would not be, to any extent, remedied by their removal. The contact between the two plants caused by conduction, and the consequent injury, do not occur upon or within the streets or through the medium of plaintiff's poles and wires located upon the streets, but upon plaintiff's private property, and that of its subscribers, lying outside of the streets and within half a mile on either side.

The fact of plaintiff's occupation and use of the streets, a controlling factor in determining defendant's liability for loss by induction, is irrelevant in the consideration of the question of defendant's liability for loss by conduction. This question must be determined as if plaintiff had no poles or wires upon the streets.

The proviso in the statute of 1885, forbidding plaintiff, by its use of the streets, to obstruct their ordinary use, has no application to the question under consideration. That proviso limits plaintiff's use of the streets, but it does not abridge its right to private property outside the streets, and wholly detached from their use. That statute confers upon plaintiff the use of the streets, and limits that use. It does not confer upon plaintiff any

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rights of private property outside the streets, and does not undertake to abridge any such rights. The proviso pertains wholly and exclusively to the use of the streets.

The defendant's claim to the dominant use of the streets, if conceded, has no place in the consideration of this question involving the rights of the parties outside the streets.

Another contention of a kindred nature, made on behalf of defendant, may be conveniently disposed of in this connection. It is insisted that plaintiff's corporate franchise was revoked or modified as an effect of the legislation permitting street railway companies to use electricity in the propulsion of their cars, at least, so far as to render it subordinate to defendant's junior franchise.

To state it in another form, the insistence is that the Act of 1885, for the benefit of telephone companies, has been repealed or modified by implication by the Acts of 1887 and 1889, for benefit of electric street railway companies. Repeals of statutes by implication are not favored. Repugnancy between statutes must be plain and unavoidable, or a later statute will not operate to repeal an earlier one by implication.

Again, no intention on the part of the Legislature to abridge the granted rights of one corporation by a new grant to another will be recognized by the courts, unless such intention plainly appears in the law. And especially should this rule prevail when both corporations are, as in this

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case, useful public servants, equally indispensable to public convenience, and the one enjoying the older grant has acquired property and expended money upon the faith of it which would be destroyed by the revocation of its franchise. It may be conceded that, under our Constitution of 1870, corporate franchises are revocable at the will of the Legislature. The Legislature has undoubted power to exclude a foreign corporation from the State. In neither instance would the corporation have just cause to complain. But this power does not extend to the confiscation of the property of the corporation thus denied the exercise of its franchise. But, in the case under consideration, the plaintiff's rights and franchise have not been abridged or revoked by any subsequent legislation in favor of street railway companies. Had a result so extraordinary been intended as the revocation, without compensation, of the telephone franchises for the benefit of the street railways, it would have found expression by positive enactment. It cannot be admitted by implication upon this record.

There is no necessary conflict between the rights and franchises of these companies. There is not any unavoidable repugnancy between the statutes upon which they respectively rely. The electric railway plant can be operated, under proper limitations as to distance and apparatus, without causing injury to telephone plants by conduction. This fulfills defendant's grant without trenching upon the pre-existing rights of plaintiff. If defendant

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seeks to have a more beneficial use of its plant by an invasion or use of plaintiff's property, it is just that compensation should be made.

Our conclusion is that plaintiff's rights have not been abridged or revoked by the Acts of 1887 and 1889, but remain precisely as they were before the passage of these statutes. It should be observed, in this connection, that the injury caused by conduction is not such necessary incident to the ordinary use of the streets as to have been contemplated and compensated for in the original taking for street uses. It is not necessarily, or even ordinarily, inflicted upon abutters, but extends to many properties, on either side, that have not been taken or subjected to any burden for street uses.

This brings us to the consideration of a novel and very important question. It is insisted by defendant that plaintiff cannot recover the damages caused by conduction, except upon the theory that it has the right to the exclusive use of the whole earth for electric purposes. A monopoly of the earth's use for any purpose, or by any person, is, of course, inadmissible. The plaintiff, however, repudiates this ambitious and extravagant claim, and insists that its demand is the more modest and reasonable one for the exclusive use of electricity upon its own premises, in an authorized and non-hurtful manner, without injurious disturbance from non-natural electric conditions caused by the defendant's acts.

To recall the pertinent facts: The plaintiff had,

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by public authority and permission, erected and equipped its telephone plant upon an approved plan, and put it into successful operation, grounding its wires upon the property of itself and subscribers, and using the earth as a "return circuit," in accordance with the universal practice of half a century in like enterprises. Afterwards, defendant, by like permission, began the operation of a "single trolley" electric railway plant, using the earth as its "return circuit." The defendant's plant was placed in such proximity to plaintiff's pre-existing plant as to cause injury to the latter by conduction. The operation of plaintiff's plant caused no injurious disturbance of natural electric conditions anywhere.

In the operation of defendant's plant large and turbulent artificial currents of the electrical fluid were generated and poured into the streets beyond defendant's control. These currents, following a natural law, left the streets and overflowed private property for half a mile on either side. It was upon the private property of plaintiff and its subscribers, and not elsewhere, that these abnormal electric currents found and ascended plaintiff's ground wires and throttled its plant. The injury by conduction can be obviated at an expense which entails no great hardship upon either party.

We think, upon these facts, that plaintiff has the right to the protection of the Courts in the enjoyment of its property. Franchises, easements, and the ability to use property, though intangible,

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have value, and are, equally with tangible property, entitled to the recognition and protection of the Courts. If plaintiff's claim, that contemplates no more than a lawful and non-hurtful use of its own property, shall be characterized as a demand for the monopoly of the whole earth, what shall be said of defendant's larger demand for a hurtful use not only of the streets, but of private property for half a mile on either side? The plaintiff's request is: "Let me alone in that use or application of electricity upon my own premises, that causes no harm or disturbance to any one anywhere." The defendant's command is: "Get out of my way!" to all feeble electrical enterprises that may have the misfortune to come within the range of its power.

The plaintiff proposes an adjustment of conflicting claims with defendant by the rule embodied in the enlightened maxim, *sic utere*, etc., while defendant insists upon the application of that ruder maxim, "might makes right." If defendant could succeed in its contention, there can be little doubt that the unjust rule thus established would some day "return to plague the inventor." What protection has this defendant in the enjoyment of its vast properties, if it can be deprived of the power to operate them by some younger, but more robust, child of invention that shall hereafter obtain mastery in the electric world? Is not the non-injurious use of electricity the only safe and just basis for the adjustment of the conflicting claims

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of electrical inventions and enterprises? What different basis than this can be arbitrarily established? Where shall the line be drawn between those electrical enterprises that must take care of the artificial currents of electricity generated by them, and those that shall not be required to do so?

To concede defendant's claim is to give to it a hurtful use of plaintiff's property, and at the same time to deny plaintiff the harmless use of its own. The argument that assumes that plaintiff is claiming the whole earth as a return circuit, and therefore appropriating a common right to its exclusive use, because "plaintiff's portion of the earth cannot be isolated and separated electrically from the balance of the earth," is one which, if pressed to its logical results, would work a revolution in the law as to the use of the earth, the water, and the air. How, if this argument be sound, can any one insist that the air and water, that, by the operation of natural law, visits his premises and supports life, shall not be rendered noisome and impure by the injurious acts of his neighbor? It is impossible that his portion of the air or water can, in advance, be "isolated and separated from the balance." Is not the right to the use of air and water as "common" as that to use electricity? If the right to the non-hurtful use upon one's own premises, without injurious disturbance from others, of air or water or electricity, is made to depend upon his ability to isolate and separate, in advance, his portion of these

elements from the "balance," that right resolves itself into an "airy nothing."

The suggestion that plaintiff, in using the earth as its "return circuit," appropriates and uses electrically the properties intervening between its "exchange" and its subscribers' stations in any other than a lawful manner, is, as we think, based upon a misconception.

The plaintiff's use of electricity causes no disturbance electrically upon these intervening properties or elsewhere, and affords no inducing cause, there or elsewhere, for the invasion of its property by defendant's artificial electrical currents.

The plaintiff uses the intervening or other outside properties for electrical purposes in no other sense than it uses abutting lands as a part of the frame-work of the earth to support its own; or uses the channel of the stream upon adjoining lands that conveys the water, by natural flow, to its own; or uses the law of gravitation that causes the water to flow toward its land instead of in an opposite direction. The plaintiff does not assert the right to an injurious use of electricity, even upon its own premises.

The doctrine that reason sanctions and justice approves, as it appears to us, is that the lawful, harmless, and accustomed use upon one's land, alike of water, air, or electricity, cannot be lawfully obstructed or impaired by the injurious act of another, attended with such disturbance of natural and existing conditions, and consequent

loss, as that caused by conduction in this case, especially when the party performing the injurious act, had the power to obviate and remedy the injury or loss, without greater sacrifice, comparatively, than is required of defendant in this case to remedy conduction.

It is not material that the injurious act is done upon the premises of one other than the injured party—as, if the channel of a stream is cut upon adjoining lands, and the water diverted, or the waters are there arrested in their regular flow and then turned loose in flooding quantities.

To sustain plaintiff's claim accords with the analogies of the law, as will appear from the following cases:

A manufacturer of cocoa matting used a delicate chemical to bleach his matting, which was then hung out on his own land in the air to dry. Another manufacturer made sulphate of ammonia, and the vapors escaping in the air combined with the bleacher's chemicals and blacked his mats. It was shown that if the cocoa mat-maker had used another chemical just as good, or better, his mats would not have been affected. But it was held that he had the right to use any chemical he pleased which would not hurt anybody else, and that he had the right to have the air come to his lands pure and untainted. *Cooke v. Forbes*, L. R., 5 Eq. Cas., 166.

A manufacturer discharged the refuse from his works into a surface stream. It corroded the

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boilers of another factory below, which used water from the stream for steam purposes. The upper manufacturer was enjoined. *Merrifield v. Lombard*, 13 Allen, 16 (S. C., 90 Am. Dec., 172).

A manufactory of copper in one case, and of lead in another, gave off vapors, which were carried by the winds upon the lands of another, and injured growing crops, fruit trees, and flowers. They had to close down. *St. Helen's Smelting Co. v. Tipping*, 11 House of Lords Cas., 642; App. of Penn. Land Co., 96 Penn. St., 116 (S. C., 42 Am. Rep., 534).

A brewer bored a deep well and got water for use in making his ale. There was no running stream below. His neighbor had a similar well, but used it as a sink. The sewerage percolated the brewer's lands, and polluted the water so it could not be used in making ale. The brewer was protected in the use of his well. *Ballard v. Tomlinson*, L. R., 29 Ch. Div., 115 (S. C., 24 Am. Law Reg., 634).

The Standard Oil Company stored oil in its warehouse. The oil barrels leaked. This leakage, soaking into the earth, percolated Mr. Kinnaird's land, and ruined his spring. It was held the company had no right to thus use its property. *Kinnaird v. Standard Oil Co.*, 89 Ky. (S. C., 25 Am. St., 545).

A silk-maker required water of great softness and purity to wash and dye his silks. He got it out of the "Charnot." A public water company

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built a reservoir above, and so collected the water that when it was discharged, the purity of the water was affected. The company had to quit. *Clines v. Staffordshire, etc., Co.*, L. R., 8 Ch. App. Cas., 126; Gould on Waters, Sec. 219; *Acquae-nock Water Co. v. Watson*, 29 N. J. Eq., 372.

Although the precise question determined in this case has not hitherto been necessarily involved in the decision of any case, it has, nevertheless, been considered by some of the Courts.

In *Hudson River Tel. Co. v. Watervliet T. & R. Co.*, 52 N. E. Rep., decided in 1892, the Court of Appeals of the State of New York expressed its views as follows:

"The defendant insists that it has an equal right with plaintiff to make use of this property, or law of nature, in the conduct of its business, just as all are entitled to the common use of the air and the light of the heavens, which, in a certain sense, is undoubtedly true. But the defendant does something more. It does not leave the natural forces of matter free to act, unaffected by any interferences on its part. It generates and accumulates electricity in large and turbulent quantities, and then allows it to escape upon the premises occupied by the plaintiff, to its damage.

"We are not prepared to hold that a person, even in the prosecution of a lawful trade or business upon its own land, can gather there, by artificial means, a natural element like electricity, and discharge it in such volume that, owing to the

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conductive properties of the earth, it will be conveyed upon the grounds of his neighbor with such force and to such an extent as to break up his business or impair the value of his property, and not be held responsible for the resulting injury. The possibilities of the manifold industrial and commercial uses to which electricity may eventually be adapted, and which are even now foreshadowed by the achievements of science, are so great as to lead us to hesitate before declaring an exemption from liability in such a case. It is difficult to see how responsibility is diminished or avoided because the actor is aided in the accomplishment of the result by a natural law. It is not the operation of the law to which plaintiff objects, but the projection upon its premises, by unnatural and artificial causes, of an electric current in such a manner, and with such intensity, as to materially injure its property. It cannot be questioned that one has the right to accumulate water upon his own real property, and use it for a motive-power; but he cannot discharge it there in such quantities that, by the action of physical forces, it will inundate his neighbor's lands and destroy his property, and shield himself from liability by the plea that it was not his act but an inexorable law of nature that caused the damage. Except where the franchise is to be exercised for the benefit of the public, the corporate character of the aggressor can make no difference. The legislative authority is required to enable it to do

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business in its corporate form; but such authority carries with it no lawful right to do an act which would be a trespass if done by a private person conducting a like business. If either collects, for pleasure or profit, the subtle and impalpable electric fluid, there would seem to be no great hardship in imposing upon it, or him, the same duty which is exacted of the owner of the accumulated water-power—that of providing artificial conduit for the artificial product, if necessary, to prevent injury to others.”

The opinion of the Supreme Court of New York was to the same effect.

An English Judge, in a recent case, has thus stated his views:

“But, after reflecting much on the merits of the case, on the argument addressed to me, and on the peculiarity of an electric current as distinguished from every other power, I fail to see any reason why the principle should not be applied to it. I cannot see my way to hold that a man who has created—or, if that be inaccurate, called into special existence—an electric current for his own purposes, and who discharges it into the earth beyond his control, is not as responsible for damages which that current does to his neighbor as he would have been if, instead, he had discharged a stream of water. The electric current may be more erratic than water, and it may be more difficult to calculate or to control its direction or force, but, when once it is established

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that the particular current is the creation of, or owes its special existence to, the defendant, and is discharged by him, I hold that if it finds its way onto his neighbor's land, and there damages the neighbor, the latter has a cause of action." *Nat. Tel. Co. v. Baker*, L. R. (1893), 2 Ch., 186.

The same doctrine was maintained by Judge Taft, then Judge of the Superior Court of Cincinnati, and now a Justice of the Federal Circuit Court of Appeals, in the case of the *City and Suburban Tel. Ass. v. The Cincinnati Inclined Plane Railway Company*.

The injury by conduction constitutes such invasion or taking of plaintiff's property as renders defendant liable for the damage done. It is a direct and immediate result of defendant's injurious act. It imposes a burden upon plaintiff's property that impairs its use and value. The loss is fixed and definite in amount. It can make no difference that no material thing was taken, or that the loss resulted, not from contact of material things, but through the agency of the subtle and impalpable electric fluid.

The important consideration is that a thing of value has been taken from plaintiff for the benefit of defendant as the representative of the public, and for that thing compensation must be made. It is a plain dictate of justice that the public, not the individual citizen, should bear the burdens imposed upon private property for the public benefit. That defendant's act may have been author-

ized and lawful can make no difference. The Legislature has not the power (except, perhaps, as to corporate franchises) to authorize, and in this case it has not undertaken to authorize, the taking of private property for a public use without compensation.

Says Mr. Taylor on Corporations: "To constitute a taking of property, it is not necessary that any *material* thing be actually taken; it is enough if any *right* of the owner respecting the thing owned be impaired, so that he cannot apply the thing to all the uses of which it was formerly capable. The Legislature cannot authorize either a direct or a consequential taking or *injury* to property without compensation; and if a corporation voluntarily, for its own benefit, so constructs a work as necessarily to injure the property (*i. e.*, the thing owned) of an individual, or deprive him of any right he may possess regarding the thing which he owns, or his rights therein, it will be bound to compensate him for his damages, even though the work be properly and lawfully constructed." Taylor on Corp., Secs. 173, 473, and numerous cases cited.

Mr. Lewis, in his late exhaustive work on Eminent Domain, sums up the doctrine in these words: "What possible distinction can there be between the actual taking of my property, or a part of it, and occupying it for the erection of a railroad track, or a gas-house, and *invading* it by an *agency* that *operates* as an actual abridgment

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of its beneficial use, and possibly a complete and practical ouster? (Sec. 152.)

"An Act which authorizes a particular business at a particular place, which necessarily defiled the air so as to create a nuisance, would be void, and unless it was for public use—such as manufacturing gas for a city—would be subject to the constitutional limitation of making compensation." Lewis on Emi. Dom., Sec. 152; and see *Ib.*, Secs. 149, 55, 57.

Says Mr. Wood, in his work on Nuisances:

"Wherever the exercise of the right (asserted) operates to destroy an *easement* incident to real property or *amounts* to an actual physical invasion, of property by some *agency* that produces injury thereto, or imposes a *burden* thereon, this is a taking of property." Sec. 762.

And, further: "The Legislature cannot confer upon a corporation the right to do any act that imposes a burden upon the property of others, that amounts to an actual taking of property for public purposes, so as to exempt such corporation from liability for all damages that result from the exercise of their franchise, that, in law, amounts to a taking of property." Wood on Nuisance, Sec. 759. See, also, *Gay v. Knoxville*, 85 Tenn., 92; *Street Ry. Co. v. Doyle*, 88 Tenn., 747; *Myers v. St. Louis*, 82 Mo., 378; *Abendarth v. Manhattan Ry.* (N. Y.), 19 Am. St. Rep., 461.

The injury by conduction does not belong to that class of "consequential injuries" or "incon-

veniences" which, it is said, must be borne in ordinary cases without compensation, as the penalty and price of living in cities and enjoying the conveniences and comforts of civilized life. These are usually of such character as to affect the community generally, and are, therefore, in a sense, borne by the public. The damages thereby inflicted are, moreover, not of easy and satisfactory computation.

Here the injury is the direct result of an injurious act, and of a graver character than a mere inconvenience. It affects a single person seriously, and the community only incidentally. The loss inflicted is definite in amount.

We respectfully dissent from the view expressed by Judge Brown, in the injunction case between these companies, where he classes this injury with the inconveniences that result from "the smoke that fills our lungs and soils our garments; the dust that enters our dwellings and stores and damages our furniture; the noxious odors that assault our nostrils; the impure water we are sometimes compelled to drink," which, he says, "are the necessary penalties we pay for living in cities, but in ordinary cases there is no legal remedy for the evil." 42 Fed. Rep. This is not, in our opinion, an ordinary case, in which compensation should be denied, even if it is classed as an "inconvenience" or "consequential injury."

It has been suggested that the electric railway companies may be subjected to multiplicity of suits

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under this decision. That may be inconvenient and expensive for the railway companies, but it constitutes no defense to their liability for the value of private property taken for their use. Besides, the inconvenience is not all on one side. It might prove equally inconvenient for the citizen to have his right to maintain a telephone at his home or place of business placed at the mercy of the electric railway companies.

One question remains: Was it plaintiff's legal duty, upon the institution of defendant's electric system, to protect itself against the injurious consequences by making, at its own ultimate cost, such changes in its pre-existing plant as would obviate the effects of conduction—*e. g.*, by putting in the "McLeuer Device?"

We answer this question in the negative. The defendant must take care of the natural and reasonable consequences of its own act. The plaintiff, being in the lawful possession and enjoyment of its own property, was under no obligation to take notice of defendant's approach, or to get out of its path.

Judge Brown says, in his opinion in the injunction case: "If, in the case under consideration, it were shown that the double trolley would obviate the injury to complainant without exposing the defendants or the public to any great inconvenience or a large expense, we think it would be their duty to make use of it, and should have no doubt of our power to aid the complainant by an injunction."

This is correct as regards the application for an injunction, but, if it is to be understood as holding that defendant would not be liable for the loss by conduction if plaintiff could apply the cheaper remedy, then we dissent from the view expressed. The plaintiff can only recover such loss as necessarily resulted to it from defendant's act. It must use due diligence to prevent unnecessary loss. The fact that plaintiff could apply the cheaper remedy would affect the amount of its recovery, but not the fact of defendant's liability. The right of the owner to compensation for his property taken for public use does not depend upon any consideration of this sort.

We have been referred to some cases that maintain views in apparent conflict with those expressed herein. It is sufficient to say of these cases that the New York and Ohio cases were decided chiefly upon consideration of particular statutes. *Railway Co. v. Tel. Ass.*, 48 N. Y., 390. They were, without exception, injunction cases, in which the telephone companies appeared at great disadvantage, as seeking to obstruct the path of progress, and to debar the public of a great convenience. In that contest, the telephone companies sought to take the lives of the electric railway companies. Here the question is one of liability for a sum that would impose no serious hardship upon either party to bear. In none of the cases was the question here decided necessarily involved. It was discussed, however, by some of the Courts. It

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was perfectly clear in the injunction cases that the telephone companies were not threatened with irreparable injury. They had an adequate remedy by suit at law for damages. On the other hand, to have enjoined the railway companies would have inflicted irreparable injury upon them and the public.

As the result upon the whole case, the judgment below is affirmed as to the loss by induction, and reversed in all other respects. And upon the written stipulation of the parties that final judgment shall be entered here, there will be entered in this Court judgment in favor of plaintiff and against defendant for \$3,660.58 for loss by conduction, and \$816 for loss by conflict of poles and wires, with interest from date when expended, and all costs of this cause.

Judge Caldwell concurs in the result of this opinion on the question of conflict of poles and wires, and on the question of induction, but does not agree on the question of conduction.

DISSENTING OPINION.

WILKES, J. I concur in the opinion of the majority as to the liability of the electric railway company for damages for the interference of the poles and wires of the railroad company with those of the telephone company, on Main Street, East

Nashville, upon the ground upon which it is placed by the majority; I also concur with the majority as to the liability of the railroad company for all damages caused by conduction, and think the conclusion can properly be arrived at upon the grounds taken by the majority; but I am unable to concur with the majority that the use of the streets by an electric railway company is an ordinary use of the streets in the sense of the statute and charter provisions. The use of a street, in its broad sense, is the purpose or object of the street. This is simply to furnish a highway or passage-way from one portion of the city to another, and from one man's premises to another. But this highway may be used for this purpose in many different modes. It may be used by foot-passengers, by horses, by carriages, by wagons, or by street-cars drawn by animal power. These are all ordinary or common uses, and have been from time immemorial. What is, then, the ordinary or legitimate use of the street? We would say, in the words of Mr. Lewis, in 6 Am. R. R. & Corp. Repts., page 326:

"First.—The right of passage; the right of each member of the community to use the street for travel on foot, with animals, or in vehicles drawn by animals, including the right to such new modes of conveyance as are adapted to the ordinary surface of the highway, and are free to be employed by any member of the community.

"Second.—The right to improve the street for

the purpose of facilitating the right of passage, as by grading, paving, draining, lighting, etc.

“*Third.*—The right, sanctioned by long usage and acquiescence and by frequent judicial recognition, to lay sewers, gas-pipes, and water-pipes beneath the surface, for use not only in connection with the right of passage, but also in connection with the abutting property.

“*Fourth.*—The right, possibly, to use the space beneath the surface to a limited extent for pipes or other appliances to distribute any article of convenience or necessity to the occupiers of abutting property, such as steam, petroleum, hot water, electricity, and the like.

“*Fifth.*—The right, upheld by very numerous decisions, of laying down a street railroad so as to correspond with the surface of the street, and to be operated by animal power. Beyond this the authorities do not compel us to go, and reason and justice forbid.”

It has been uniformly held, and it is conceded, that an ordinary horse railway is an ordinary use of the streets. It is virtually the same as a carriage or omnibus line, except the simple fact that the street-car is confined to a single track, while other vehicles may pass at will over other parts of the street between the pavements. 2 Dill. on Munic. Corp., 722; 2 Am. R. R. and Corp. Repts., page 55, note. This Court has held that a dummy line is a new use and an additional servitude. *Street Railway Co v. Doyle*, 4 Pickle, 751. It has

likewise been held that a cable-car line is an additional servitude. *People v. Third Avenue Railway Co.*, 112 N. Y., 396. That an elevated railway is a new use has also been held, and is generally conceded. Thus the law stands as to the several improvements upon the ordinary street railroad.

Now, at the time the electric car system was inaugurated, "an electric street-car was neither usual or common. *It was not even lawful.* Not until several years *after* the telephone was in operation was it lawful to use such power to propel street railways. A net-work of wires; double rows of poles; cross-wires, and long wires charged with dangerous currents of electricity; constant and dazzling flashes beneath the wheels; cars running swiftly, without any visible means of propulsion (the most alarming form of locomotion to horses), and flashing fire all the while; noisy machinery, and all unknown to former ages, and now allowable only by special statute, can hardly be called the usual and common, or 'ordinary,' use of a public street."

I think the practicable test to determine whether the use is a new or an ordinary use, is the character and kind of the motive power used. There are valid and permanent distinctions between different sorts of traffic—between a railroad which conforms to the surface of a street and one which does not, between a railroad with a superstructure and one without a superstructure, between a railroad operated by animal power and one operated

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by other power. The march of invention cannot obliterate these distinctions, nor can improvements and variations in railroad construction and operation.

All of these distinctions can be applied to the horse railroad, and it is capable of a logical and permanent distinction from all other railroads. The one particular which distinguishes it from all other railroads is the motive power. Other railroads may be operated upon the same sort of tracks; other railroads may be operated without a superstructure, or may be confined to street passenger traffic, but animal power is animal power for all time, and no other form of power can be confounded with it. In all the early horse railroad decisions, the identity of the motive power with that applied to ordinary vehicles was especially relied upon. The moment this basis of distinction is cast aside, that moment the whole subject is thrown into inextricable confusion. If the steam motor is allowed, then there is no resting place between the smallest motor and the largest locomotive.

While I think the reason of the rule is that the electric car line is a new use and additional servitude, I do not consider that the question is settled to the contrary by the authorities. I recognize the number of authorities cited by the majority opinion. Only two of them are decisions of Courts of last resort (*Cincinnati Inclined Road v. Telephone Association*, 12 L. R. A., 534; *Hudson*

River Tel. Co. v. Watervliet Tel. & R. R. Co., 52 New Eng. Rep.), and these were upon statutes and charters different from ours, and having peculiar provisions. Moreover, all the cases were applications in equity for an injunction by the telephone company, in which it was necessary to show not only that the telephones were wrongfully interfered with and injured, but also that the remedy at law was inadequate, and the injury not susceptible of being righted by an action at law for damages. The action being brought by the telephone companies, the result was that in most cases the injunctions were refused. But the text-writers agree that the question, as between the telephones and railways, is still open and unsettled, and they incline to the view that the electric car system is a new use and additional servitude. Keasly on Electric Wires, 153; Thompson on Electricity, 64; Booth R. G. Law, Sec., 135; 6 Am. R. R. & Corp. Reps., p. 336; 2 Dillon on Mun. Corp., 892, 2d Ed.; 2 Am. R. R. & Corp. Reps., 57.

In this case, for the first time, the naked question of law is presented, untrammelled by the considerations which applications for injunctions in advance involve. The present case is one *at law*, to recover damages which have been sustained, and the cases cited and relied on by the majority are not conclusive.

Holding to this view, I am of opinion the electric company is liable for all the damages caused to the telephone plant, and the judgment of the

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Court below should be reversed, and judgment given here for the several amounts claimed.

I concur in this opinion. A. D. BRIGHT, *Sp. J.*

DISSENTING OPINION.

SNODGRASS, J. I cannot agree with the majority of the Court as to liability of defendant for injury by conflict of poles on the streets, and my disagreement is based upon the ground that defendant's use of the street, being the dominant use for a proper street purpose, and the city having in fact authorized and directed the erection of the electric railway poles where placed, the telephone company, whose occupation of the street, while a lawful and permissive one, was nevertheless not a street use proper, cannot complain because the poles of the electric railway company were placed on one side of the street when, in fact, they might have been placed on the other. The telephone company can no more complain of this than could any other property holder on that side of the street complain because poles were not located on the other. If so, when such poles are placed in front of buildings constructed on one side of the street, opposite which there are none, the owners of the build-

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ings may then rightfully complain that the poles should have been placed on the other side, and in front of the vacant property, a clearly inadmissible claim.

It being clear that the telephone company is on the streets merely by permission, and that their occupancy is subordinate to any street use to which the city might wish to devote the streets, when the city has undertaken to use them for electric railway purposes it cannot be hindered in doing so, nor can the telephone company claim damages for such use authorized and directed by the city. The concession or determination that the electric railroad use is a proper street use is conclusive of that question, and neither the city nor the company can be made by the telephone company to select one side rather than another of the street for placing the poles, or pay damages if it does not do so. On this theory alone, too, is based the other conclusion of the majority that the defendant is not liable for damages caused by induction. If not liable for one, it is not for the other. Properly considered, the two conclusions are necessarily in conflict.

It will not do to say the city can let the electric railway company run its wires parallel with the wires of the telephone company on the streets so as to destroy the use of the latter wires and not be liable, and cannot let it erect street railway poles and wires in contact with them without being liable. The right to permit the erection of

poles includes the right to permit it anywhere the poles can be properly erected, at the discretion of the city. It cannot be made, directly or indirectly, by imposition of penalty in damages on its grantee, to choose a particular side of the street. The railway use being a street use, the telephone company's rights, granted in subserviency thereto, must yield to the claim of the city and its grantee for street service. In this connection it must not be forgotten that though, under the Act of 1885, it was permitted to telephone companies to construct their lines along and over the public highways and streets, it was not intended thereby to recognize such use as a proper roadway or street use, for it was in the same Act provided that this permission was granted upon the condition that the *ordinary* use of such public highways, streets, etc., be not thereby obstructed. It is of course too clear for argument that it is not a *necessity*, for the operation of a telephone line, that it be erected in the streets. It is a convenience to it of course, and the permission it obtained through legislation was a very desirable one, but it did not obtain it upon any theory that it was a street use, nor can any such claim be made for it. With or without the Act, therefore, it is a subordinate use, permissive only for convenience, and must yield to any claim of the public for legitimate street uses, of which the electric railway is one.

On the main point in controversy—the right of damages for injuries inflicted by conduction—I also

disagree with the majority. The majority opinion is founded, and can be founded, alone on the idea that the complainant has the natural right to the use of the earth as a return circuit, for the complainant does not profess to own the intervening earth between points where its wires on the premises of its several subscribers are buried and its plant. It is only in consequence of this use of the earth, and its natural right to use it, that the telephone company's intersecting locations at various places are of value. Disconnect these from the right to use the adjacent earth owned by others than itself, intervening between these points and its "exchange," and it has no valuable property in its buried wires on the premises of subscribers. So that, in order to deny the defendant the right to use the earth for a return circuit, this very right must be conceded to complainant. And it must logically be conceded that, having first taken possession, it has acquired a monopoly of the earth.

The position destroys itself, for it must, to be true, assume the existence of a right in one which has to be taken for granted in order to disprove that the same right exists in another. It is no answer to this to say that complainant has a natural current, not disturbing electrical conditions, or a harmless current. It is not a natural current, but an artificial one, depending for its existence on the generation and specific direction of increased electric fluid, and along an artificial chan-

nel. It is not harmless any more than the other, except that it is not powerful enough to overcome or practically interfere with the other, and in the sense that, in this contact, it produces no obviously injurious results. But it is unnatural, and the hurtful or harmless character, as compared to the other, is different in degree merely, and not in kind, as both are alike artificial and powerful.

No scientist has yet been able to show how or where the injurious contact first occurs. Whether it originates on the land where the wires are buried, or elsewhere on the circuit, and pursues its entire round, is a matter of speculation merely. The hurtful overflow or disturbance may, in fact, originate at a point entirely away from the telephone wire's intersection with the earth, and on land which the telephone company does not claim; but, assuming the contact and disturbance to commence there, then it could not work an injury, unless, in connection with that particular land, the complainant had undertaken to use the earth away from it as a circuit; and so the injury is not to the specific property, but to the circuit of the earth thus sought to be appropriated and monopolized.

Complainant's use of the earth as a return circuit was, of course, on the theory we are treating it, a rightful appropriation by complainant, because that of a property of the earth for such use as is common to all. But it cannot, for that very reason, be an exclusive or monopolistic appropriation. If a right at all, it can only be a natural, common

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right, and cannot be asserted against the exercise of a like right which may impair it, because it cannot be exclusive property; for such use of the earth as may be made exclusive by monopolizing can never be recognized as property.

Principles deduced from cases of poisoned air, polluted water, obstructed light, etc., are inapplicable, as drawn from plausible but faulty analogies. These are injuries resulting in specific places to persons having the right to the free and exclusive enjoyment of so much of these elements as are their own or necessary to their own use. But such rights cannot be enlarged, and these cases made applicable to the case of a claim to use the earth for a special benefit from point of contact of a wire (part of an artificial circuit) on one's own property, to any other remote point through lands not so owned, and through which the claimant could acquire right of way only by natural inheritance, in common with all mankind, or by purchase. If the right exists as a natural right, it must be common, and cannot be exclusive. It is not pretended by complainant that it has been acquired by purchase, and, therefore, it does not, as claimed by complainant, exist at all. That complainant's private property is not affected, independently of its claim to the use of the earth as a circuit, is manifest, for no electric fluid could affect such property in the form of land leased or owned by complainant, unless the circuit—the artificial circuit—was established.

The effect of this holding of the majority is to make the railroad company liable for injury to all property within the influence of its escaping electric current, for it is assumed that the value for telephonic use of all property within the influence of this current is impaired. If this be true, it is immaterial whether such property is now being so used or not. The destruction of its capability for such use would necessarily give the right to damages. It must follow, therefore, upon this theory, that all land within the range of the electric influence of defendant's circuit is impaired in value, though not a foot of it has any such value without connecting it with an artificial circuit. This injury, it appears to me, cannot, in fact, result, but it must be held to result on the theory of the majority. The assumption that complainant has the same right to the use of the electric circuit established over adjacent lands, as it has to the support of adjacent land, use of surrounding air, or of water, distantly flowing and finally passing through its property, is obviously fallacious, because all these are natural elements in natural condition, ultimately naturally brought, without artificial means or special appropriation thereby, for complainant's use, but complainant's claim to a special artificial use of the earth throughout that portion claimed by it, as well as by others, if it is a special artificial use, is not helped by reference to natural conditions, under which his right to the enjoyment of natural elements is conceded. For,

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if treated as a natural right, complainant's claim to the earth as a circuit cannot exist to the exclusion or hindrance of an equal natural right in another. The proposition is clear that if it is an artificial right, complainant would have to show his claim to so much of the earth as he uses for a circuit as an owner, before, in any event, it could be exclusive. This he does not pretend to do, and, on this account, his claim must fail. If asserted as a natural right, it must be because it is common and not exclusive. It must fail as such, because, if sustained at all, it must be sustained as exclusive. Complainant has, therefore, no real claim of ownership or superior common right, and, on this ground, his claim for damages should be denied.

I have discussed the questions involved only upon principle, but my conclusions on both propositions are sustained by authority.

The first proposition is directly adjudged by the Courts of last resort in New York and Ohio, and my conclusion as to the second seems to have the approval of the greater number of Courts which have considered it, though not all together in theory.

In the case of the *Hudson River Telephone Co. v. The Watervliet Turnpike & R. R. Co.*, decided by the Court of Appeals in 1892, and reversing the decree of the Supreme Court of New York, cited by the majority, it was held that the telephone company's use of the street, being a subor-

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dinate one, it could not complain of injuries inflicted by the overflowing electric current of the railway company, because its right was subordinate to that of the railway company. To the same effect is the case of *Cincinnati Inclined Plane Railway Co. v. City & Suburban Telephone Association*, decided by the Supreme Court of Ohio, 1891. It is proper to say, too, that the Supreme Court of Ohio, in that case, which reversed his decree therein below, has not adopted the views of Judge Taft, elaborately quoted in the majority opinion in this case; nor do the conclusions of the Supreme Court of Ohio and Court of Appeals of New York, differing from those of Judge Taft and the Supreme Court of New York, depend upon statutes or the form of the action, as might be inferred from the majority opinion. It is true that these cases were injunction cases, as was that also between these same parties to this case, reported in 42 Federal Reporter, cited by the majority, but the questions determined in them adverse to the conclusions of the majority in this case, were not settled, so far as questions we are discussing are concerned, upon construction of statutes, nor dependent upon form of action, and these States, therefore, by decisions of their Courts of last resort, have ranged themselves on the other side of the question than that taken by the majority of this Court. The weight of authority is against the holding of the majority in this case. I have not, however, attached much importance to the

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preponderance of decided cases. The question is practically a new one; the cases on it are few, the reasons for each often different from the others, and none absolutely conclusive. I have preferred to rest this dissent upon its own reasoning.

Seat *v.* McWhirter.

SEAT *v.* McWHIRTER.

(Nashville. March 22, 1894.)

1. DEEDS. *Capacity. Undue influence.*

Where the maker of a voluntary conveyance is capable of doing the act, and there is no fraud, no concealment, and no advantage taken, the Court will not interfere. (*Post*, pp. 558-569.)

Cases cited and approved: *Hadley v. Latimer*, 3 Yer., 537; *Coffee v. Ruffin*, 4 Cold., 514.

2. SAME.

The law does not require that persons shall be able to dispose of their property with judgment and discretion in order to the validity of a conveyance. It is sufficient if they understand what they are about. (*Post*, p. 569.)

3. SAME.

The fact that grantees advised and encouraged the execution of the voluntary deeds does not impair the validity of the instruments, unless the free agency of the grantor was destroyed. (*Post*, pp. 569, 570.)

4. WIFE'S RENTS.

Where wife leaves entire management of her property to her husband, and does not, during his life, seek to charge him with rents, his representative cannot be called on to account for such rents and interest. (*Post*, pp. 556, 557.)

Cited and approved: *Lishey v. Lishey*, 6 Lea, 418.

FROM MONTGOMERY.

Appeal from Chancery Court of Montgomery County. GEO. E. SEAY, Ch.

Seat v. McWhirter.

LEECH & SAVAGE for Seat.

BURNEY & GHOLSON and VERTREES & VERTREES,
for McWhirter.

McALISTER, J. This bill was filed in the Chancery Court of Montgomery County by Mrs. S. M. Seat to cancel two deeds made by her to the defendants, A. J. and F. P. McWhirter. The grounds of the relief asked are incapacity upon the part of complainant and fraud practiced by the defendants.

The Chancellor found, upon the facts, that no fraud had been practiced by the defendants, but he ordered the deeds canceled, upon the ground that Mrs. Seat did not at the time understand what she had done, but meant to do a wholly different thing.

The complainant, Mrs. S. M. Seat, is the widow of S. B. Seat, who died intestate at Clarksville, Tenn., on February 5, 1893. The defendants, A. J. and F. P. McWhirter, are half-brothers of S. B. Seat, the intestate. The property conveyed in the two deeds from Mrs. Seat to the McWhirters is estimated to be worth about seventy thousand dollars, and consists of an orange grove in Florida, her residence in Clarksville, a pear orchard in Montgomery County, a lot in Clarksville, two tracts of land in Davidson County, and some shares of stock in a turnpike company, and Union Wharf stock. The grounds of relief are thus stated in the bill, viz.:

“When these conveyances were made, she was in much trouble; her husband had been dead less than one week; she was incapable of reasoning intelligently and with any judgment about business matters; was unacquainted with business, having never attended to any before the death of her husband. She was approached by the defendants, in whom she had implicit confidence; was told by them that this would be the best way to wind up the estate of her husband, their brother; they manifested the greatest love and consideration for her, and made her believe that they were considering her interests, and were trying to do the best for her. She did not have the advice of counsel or friends, apart from these defendants, and did not understand what had been done until after it was all over. She was induced to say, in the conveyances named, that it was the expressed wish of her husband, when, as a matter of fact, no such wish was ever expressed by him to her, but she was told this by the defendants. These defendants had the paper prepared by their attorney, at his office, and, while it was read over to her, she did not understand it as she now does, and was at the time incapable of understanding any thing of the magnitude and importance of these transactions. After these papers were prepared, and after they had been put to record, the defendants, evidently conscious of the wrong that had been done her, came to her again, and said there had been much talk about these transactions, and said they wanted her

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to acknowledge them again in the presence of some gentlemen, and again assured her that it would be best for her; that it was entirely to her interest; that they were interested in her welfare; that they were only trying to carry out the oft-expressed wish of her dead husband, and, to avoid any trouble, it would be well for her to say, in the presence of witnesses, that she was entirely satisfied with what had been done. Up to this time complainant had not fully understood just what had been done. She had not had the advice of an attorney. She did not know her rights in the premises, and would not have understood it even if at that time explained to her by a friend.

"She again states to the Court that never in his life did her husband say to her that, in the event of his death before her, that she should do as the papers executed recited. This was a matter invented and gotten up entirely and wholly by these defendants. They obtained her confidence, as before stated, called her their dear sister, and made her believe that nothing was to be considered but her welfare. Complainant has realized how she has been defrauded and imposed upon by the defendants. She has had the transactions and their magnitude explained to her, and she again says to your Honor that all these transactions were at that time entirely misunderstood by her; that she did not know that she was divesting herself of all the property she had; that she did not know any thing about it in fact, and that she had been de-

ceived, has been defrauded out of nearly one hundred thousand dollars' worth of property by these defendants, and that she desires the cancellation of these fraudulently obtained conveyances."

The substance of the answer, as condensed by counsel, is that the property held by Mr. Seat in every capacity was really his; that he never received more than \$16,000 of property by or for his wife, the complainant, and all over that was his; that he was heavily involved in debt, mostly as surety or indorser, and, in order to protect his property, and effect advantageous compromises with his creditors, he covered up his property from the close of the war until about 1890, by assuming to hold it as "trustee" for his wife; that about 1890 or 1891 he had compromised all his debts, and forthwith began to take the property out from under the trust, and had done so as to most of it at the time of his death; that it was Mr. Seat's wish and desire that the defendants, his only brothers, should have the property—except \$7,200—subject to a life estate for Mrs. Seat in the home-place, furniture, etc., and a proper support out of his estate—that is to say, that she should have the home-place, furniture, horses, cows, carriage, etc., for life, \$7,200 in money, and one-third of the income of all the property. It avers that this desire and purpose of Mr. Seat were well known to Mrs. Seat, and that she agreed and desired to carry them out; that, in pursuance of that agreement, she did execute the deeds; that she did have competent and hon-

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orable counsel, knew what she was doing, and intended and desired to do precisely what she did do; that a few days thereafter, being informed that certain of her expectant heirs were making trouble, and trying to make Mrs. Seat dissatisfied, they went to her, and proposed to make any alteration or change she desired—to cancel the deeds if she preferred; that she disclaimed that she was dissatisfied, and expressed no desire for any alteration or change whatsoever; that they left their proposition open, with the understanding that if she desired any change or cancellation, she should notify them, and they would make it; that she gave no notice, but the bill was filed five days thereafter, their first intimation that she desired any thing being service of process in the case; that they acted throughout in absolute good faith, and did not overreach, mislead, or deceive her in any way; that what she did when she made the deeds was what she ought to have done, what Mr. Seat desired, what she knew he desired, and what she herself desired and intended to do; and that the case is not her case, but really that of her relatives, the Andersons, who seek in this way to realize the expectations which were disappointed by the making of the two deeds.”

The Chancellor found that Mr. Seat died intestate, having real and personal property in his name as trustee for his wife, the complainant; that the real estate in Florida descended to Mrs. Seat; that Mrs. Seat was old and infirm, and

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deeply distressed by her husband's death, and that, for some time thereafter, because of this shock and the distress of mind incident to it, and her former dependence on him, she was incapable of understanding and comprehending transactions of the magnitude of the one in question; that, while in this frame of mind, and not understanding what she was doing, and believing that she was doing a wholly different thing, she executed, without consideration, the two deeds sought to be canceled; that the allegations of fraud in the bill are not sustained by the evidence; that she conveyed the property mentioned in the deeds without intending to do so.

And the Court decreed, upon these findings, that she (complainant) executed the two deeds ignorantly, and without understanding the real contents and tenor of the same, without consideration, and with the belief that she was doing an entirely different act by the execution of the papers; that the deeds be canceled and rescinded, and the title to the property in Tennessee be divested out of the defendants, and vested in complainant, as it was before the execution of said deeds, and the title to the Florida property be divested out of them, and vested in complainant the same as it was before the deeds were executed, in so far as the Court had jurisdiction to do so; and that the defendants should execute a deed reconveying said property to Mrs. Seat within thirty days after the adjournment of the Court, and that the Clerk and

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Master should do so in their names, if they failed to convey; and that the defendants, the Messrs. McWhirter, pay all the costs.

The defendants, A. J. and F. P. McWhirter, appealed from the whole decree. Mrs. Seat appealed from the finding of the Court that she is not entitled to relief on the ground that the deeds were obtained by fraud.

The defendants have filed the following assignment of errors:

“The Court erred in finding: (1) That Mr. S. B. Seat, when he died, held the real and personal estate in his name as trustee for his wife, the complainant; (2) that at the time the deeds were executed, Mrs. Seat was incapable of understanding and comprehending transactions of the magnitude of the one in question; (3) that Mrs. Seat did not understand what she was doing when she made the conveyances now sought to be canceled; (4) that she conveyed the property mentioned in the deeds without intending to do so; (5) that she executed the conveyances of, and to, these lands mentioned in the deeds, believing she was doing a wholly different thing.

“The Court erred in decreeing: (6) That Mrs. Seat executed the said deeds ignorantly and without understanding the real contents and tenor of the same, without consideration, and under the belief that she was doing an entirely different act by the execution of said deeds; (7) that the deed be canceled and the title to the property therein

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mentioned be divested out of A. J. and F. P. McWhirter and be vested in Mrs. Seat, as it was before the deeds were made; (8) that said defendants make a reconveyance within thirty days from the adjournment of the Court, or, failing to do so, the Clerk and Master make one in their names; (9) that the defendants pay the costs of this cause.

"The Court erred in not decreeing: (10) That the complainant's bill be dismissed; (11) that Mrs. Seat did fully and clearly understand and comprehend the nature and object of the deeds, and that she then executed them for the purpose and object therein recited and expressed; (12) that no relief can be given by decree upon the pleadings, upon any other ground than that the conveyances had been procured by deception or fraud; and, as the Court found that the evidence did not sustain the allegations of fraud, that the bill be dismissed; (13) that the conveyances sought to be canceled are good, valid, and shall stand."

The deed executed by Mrs. Seat to the McWhirters, conveying the Tennessee property, recites, viz.:

"The transfer and conveyance of, and relinquishment of claims to, all the above-described property, is made for the following reasons, and upon the following consideration: There was an understanding between S. B. Seat, during his life-time, and Mrs. S. M. Seat, his wife, that, in case of the death of said S. B. Seat, in the life-time of his wife, S. M. Seat, that all property of every de-

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scription held by him, whether as trustee for his wife or otherwise, should go to his brothers, A. J. and F. P. McWhirter, after giving her a home for life, on the house and lot where they live at his death, and making out of his estate ample allowance for her maintenance and support during her life, in the same style and comfort in which she had been accustomed to live. It was also agreed and understood between them, the said S. B. Seat and his wife, S. M. Seat, that the sum of \$7,200, which had come to the hands of her husband from the estate of her brother, Matt Anderson, should be paid to her out of the estate of her husband. * * * To the end therefore that this agreement may be fully carried out, it is hereby understood and agreed between the parties to this instrument, that Mrs. S. M. Seat shall, for her natural life, occupy the house where she now lives, free from all rents and charges, and that the taxes and insurance and repairs shall be paid by the said A. J. and F. P. McWhirter, and that she shall have, for her life, the use and benefit of all the furniture in the house, horses, carriages, cows, and such other articles or things on the place, as she may require for her comfort and house-keeping; and, in addition to the above, the said A. J. and F. P. McWhirter are to pay to the said S. M. Seat, annually, during her life-time, the sum of \$1,500 for her support and maintenance, or more if it should be required for maintaining her comfortably in the style which she has been

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accustomed to live; and it is also understood and agreed that the said A. J. and F. P. McWhirter are to pay the said S. M. Seat the sum of \$7,200, in such payments as she may require; and for the payment of such annual sum for her support and maintenance, and for the payment to her of the said \$7,200, as above stated, a lien is hereby expressly retained on all the property, real and personal, hereby conveyed."

The deed to Florida property recites the following consideration: "One dollar to her in hand paid, and in accordance with an understanding and agreement between her and her deceased husband, S. B. Seat, the said Mrs. S. M. Seat has granted," etc. This deed was put to record in Florida on February 24, 1893.

In entering upon this investigation, the first question that presents itself is, whether Mrs. Seat, at the date of the execution of these conveyances, was possessed of sufficient intelligence to comprehend the nature of the transaction. Secondly, whether, as a matter of fact, she did understand the transaction, and voluntarily executed the conveyances, without fraud or undue influence on the part of the defendants. A preliminary question, however, which has been much discussed at the bar, must be settled, and that is whether the property conveyed by Mrs. Seat to the McWhirters was the property of S. B. Seat or was the property of Mrs. Seat, or such as arose from the accretions of her separate estate. A large

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volume of testimony has been taken in elucidation of this issue. The contention of complainant's counsel is that all this property belonged to Mrs. Seat absolutely, and that it is unnatural and unreasonable that a woman in her right mind would understandingly give away to persons who are not natural objects of her bounty, such a large amount of property.

On the other hand, the insistence of defendant's counsel is that the property conveyed was the absolute estate of S. B. Seat, although held by him, for many years prior to his death, under the guise of a trusteeship for his wife, and that the conveyance of Mrs. Seat to A. J. and F. P. McWhirter was simply in execution of the oft-expressed desire of her husband that his half-brothers should inherit his estate after making an ample allowance for the support of his wife.

We find from the record that S. B. Seat, about the close of the war, was indebted several hundred thousand dollars, and, at that time, he was probably worth about \$25,000 or \$30,000, which was realized from the sale of his real estate. In order to effect advantageous compromises with his creditors, he covered up his property, by adopting a supposititious trusteeship for his wife. Mr. Seat carried on his financial operations under this device until 1891, or until all his old debts had been paid or adjusted, when he began to withdraw his property from the cover of the trusteeship.

In 1869 Mr. Seat sent A. J. McWhirter \$15,000

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by express, with which to buy up \$425,000 of old claims held against him, as indorser, by the Planters' Bank of Tennessee. McWhirter accomplished the purchase of this large indebtedness from the bank, and transmitted the bills and notes so purchased to his brother, S. B. Seat. The latter brought suit in Chicago on some of this paper, procured judgment, and caused execution to be levied on certain valuable lands, which were sold, and bought in the name of A. J. McWhirter and Mrs. C. H. Smith as the purchasers, and the title was vested in them by deeds of conveyance. Mr. Seat afterwards sold this Chicago property for \$26,500. One-half of this sum, or \$13,250, belonged to Mr. Seat, and was realized by him from this sale. The property called the home-place in the record, and worth probably \$10,000, was bought at a chancery sale in 1867. It was bid off in the name of Matt Anderson, but Mr. Seat furnished the money to pay for it. There was never any vestiture or divestiture of title. Mr. Seat took possession immediately, and held it continuously until his death. Mr. Seat also purchased an orange grove in Florida. He first purchased a two-fifths interest in 1881, and the remaining interests at later dates. These purchases were made by him, but the deeds conveyed title to him as trustee for his wife. In April, 1891, after he had compromised his debts, Mrs. Seat conveyed the whole title to him individually, for the purpose of getting the title out of him as trustee.

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Louis Anderson, witness for complainant, states that when Mrs. Seat signed the deed in April, 1891, whereby the title to the orange grove was passed from Mr. Seat, trustee, to Mr. Seat individually, she asked Mr. Seat why he did not do away with the trusteeship of the Tennessee property also, and he replied: "We will let that stand as it is." Mrs. Seat evidently knew that the trust was employed by Mr. Seat to protect his property while he was compromising his debts. Indeed, Mrs. Seat was asked, on cross-examination, referring to his trusteeship: "Was not the reason of that this: That Mr. Seat had failed, and he felt that it was largely due to his being involved through others, and that the debts were entirely too large for him to handle, and it was necessary for him to put himself in a position so that he could make a reasonable compromise?" She answered: "Yes, sir; I expect it was."

It is insisted by counsel for complainants that Mr. Seat had neither money nor property, but that Mrs. Seat's estate, and its investments and reasonable profits, afforded largely more than enough to pay for all the property purchased, including the Florida property, and their contention is that the property, at the death of Mr. Seat, all belonged to Mrs. Seat. We will now inquire what property Mr. Seat owned individually, and what he received from his wife during the time he was acting as trustee.

First, we are of opinion the record shows that

Mr. Seat, after converting his real estate at the close of the war, was probably worth \$25,000 in money. It is also shown that he realized \$13,250 from the sale of the Chicago property. He also received commissions amounting to \$1,000 for services as administrator of Matt Anderson's estate; and also commissions of \$1,000 as administrator of George Anderson's estate; also \$2,212 commissions as executor of James Anderson's estate; also \$1,500 charges against Susie Anderson, retained out of the funds of the estate in his hands; also \$2,900 from the estate of his step-father and mother, Mr. and Mrs. G. W. McWhirter; also \$2,750 excess of \$2,000 credited on account of commissions in purchase of land from A. J. McWhirter, December 29, 1881. Mr. Seat purchased for himself two town lots in Clarksville, in 1882, at the price of \$743, which he afterwards sold, in 1891 or 1892, at a profit of \$2,645. He also received rent every year from the place he had purchased in 1881 from A. J. McWhirter, and also from the Sam Anderson place.

Our next inquiry is in respect to the property received by Mr. Seat during these years which belonged to his wife.

First, Mr. Seat collected from the estate of Jas. Anderson, who was the father of Mrs. Seat, \$6,139.65, and from the personal estate of Matt Anderson, who was Mrs. Seat's brother, \$2,730.15, and from the sale of the Matt Anderson real estate, \$7,169.30, making together the sum of \$16,039.40.

It is insisted, however, by complainant's counsel

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that Mr. Seat was chargeable with the rents and income arising from Mrs. Seat's real estate. This contention is not tenable, for two reasons—to wit, first, the proof shows the real estate in question was simply a general estate; secondly, if it had been vested in Mrs. Seat, as a technical separate estate, they lived together, and the entire management of the estate was left to Mr. Seat. Mrs. Seat never sought to charge him with these rents during his life, and his representative cannot be called on to account for the interest or rents and profits. *Lishey v. Lishey*, 6 Lea, 418; *Edgar Jones, Guardian, v. Union Bank and Trust Co.*, MS., Nashville, December Term, 1893.

We are also of opinion that it appears from the facts in this record that, when Mr. Seat had settled his old debts, he abandoned the trusteeship and began to do business as an individual, and use the trust property as his own. As evidence of this change in his whole course of business, about two years before his death, he changed the form of his account in bank from S. B. Seat, trustee, to S. B. Seat. In March, 1891, Mrs. Seat joined in a deed conveying the legal title to the orange grove to him individually. In 1892 he settled with his wards, and conveyed to them, in payment of that individual indebtedness, two houses and lots in Clarksville, which he held as trustee. In 1884, while compromising his debts, he purchased with his own money, two lots in Nashville, taking the title to himself, as

trustee. In January, 1892, he sold these lots, taking notes payable to himself as an individual, and not as trustee. Many other facts and circumstances could be mentioned as evidence of this change in his course of dealing with his property.

We are of the opinion that, at the date of Mr. Seat's death, he was the owner of all the property, excepting the farm in the bend, which is not included in the McWhirter conveyances, and the \$16,039.40 received from the estates of Jas. and Matt Anderson.

It appears from the record that the most affectionate and fraternal relations had always existed between Mr. Seat and his two half-brothers, who were the only relatives he had living bound to him by the ties of blood. It also appears that the most cordial and friendly relations had always existed between Mrs. Seat and the McWhirters. There is evidence tending to show that Mr. Seat had expressed a desire that his estate should be inherited by his half-brothers, after making an ample allowance for his wife. There is also evidence tending to show that Mrs. Seat knew the wishes of her husband in respect to the disposition of his property, and desired to have them carried out.

The disposition of these preliminary questions brings us to the consideration of the main issue in the case—to wit, the execution of the instruments which are sought to be annulled. It is insisted by defendants that these deeds were executed

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by Mrs. Seat understandingly, in accordance with Mr. Seat's wishes, and there was no misapprehension, deception, or fraud.

It appears from the record that Mrs. Seat is a lady sixty-seven years of age. She is described by Mrs. Bryce Stewart, one of the principal witnesses, "as a woman of fine mind; reads a great deal; never impulsive and rarely demonstrative; strictly honest and truthful; and, further, that she is a retiring woman, and talks very little." Louis Anderson, her nephew, testifies that she is ignorant of all forms of business, but that she is a woman of unusual intelligence and good judgment, and was always consulted by her husband when he contemplated an investment. Mrs. Stewart was asked if Mrs. Seat's condition mentally, after her husband's death, was other than natural under all the circumstances. Her reply was: "No, I think not; am sure not." Such was the mental and personal character of Mrs. Seat, as portrayed by two of her principal witnesses.

On February 13, 1893, succeeding the death of Mr. Seat, which occurred on February 4 of the same year, Messrs. A. J. and F. P. McWhirter went to Clarksville, and on February 15 the transfer of the property was agreed upon. The question arose in respect to the counsel that should be employed to draft the instruments. They readily agreed upon Col. John F. House, who had always acted as Mr. Seat's counsel. Mrs. Seat remarked: "Get Mr. House, and if you cannot find

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Mr. House, get Mr. Savage, and have the papers drawn." F. P. McWhirter stated that Colonel House could represent both sides in the matter. Colonel House was accordingly employed, and he states that, at the time of his retainer, Mr. Fount McWhirter remarked: "We want you to give Mrs. Seat's side attention in this matter as well as ours." When they had all assembled at the residence of Mrs. Seat, Mr. F. P. McWhirter again remarked to Colonel House, in the presence of Mrs. Seat, that Colonel House was there to act for both parties. Col. John F. House, in his deposition, describes what occurred at the residence, as follows:

"*Question* 12. Now state, when you got to Mrs. Seat's, what then occurred?

"*Answer.* When we got there Mrs. Seat was there, and A. J. and F. P. McWhirter, who went there with me. We went into the room where Mrs. Seat was, and I spoke to her, giving her the usual salutation, and this matter was all talked over in her presence—what was to be done, what provision was to be made for her, what was to be conveyed to them; and it was spoken of as understood between her and Mr. Seat what was to be done. Mrs. Seat did very little talking, but the McWhirters stated over in her presence what they had stated in my office—substantially the same they had said to me in my office. That was, the portion of it that was to be given her. And one of the McWhirters remarked to me in Mrs. Seat's

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presence, 'We want you to act for Mrs. Seat as well as for us.' Well, in reference to their giving her one-third of the proceeds of the income derived from the estate, I suggested that perhaps it would be better, if Mrs. Seat was to be provided for, that a certain sum be paid her instead of paying her one-third of the profits of the estate. I went on to say, further, that I supposed there was not much profit in that orange grove, that I understood some years it was profitable and some years it was not; and if provision was to be made for her, it ought to be made a certain sum, and not such a dependence put on the profits of the property. Of course I did not suggest as to the amount to be paid her. They all seemed to agree to it, that there should be some certain sum to go to her instead of one-third of the profits for life. Well, then 'Fount' McWhirter (I think it was) spoke up and said—I do not know whether he said he had learned it from Mr. Seat's papers or not, but he had learned it in some way—that Mr. Seat's family expenses had been about \$1,800 a year, and he mentioned that sum. Mrs. Seat spoke up and said that that was too much, that she did not need that much. And they went on to discuss that, and, in talking about the matter, she spoke of the rents she got from the place up here in Davidson County. My recollection now is that these rents amounted to about \$800 or \$900. Well, the discussion went on about \$1,800 being too much, and finally the sum of \$1,500 was agreed

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upon as about what she would need. And in talking the matter over in that way, it was all spoken about there before her that they were to pay her this \$7,200 that Mr. Seat got, as I understood from their conversation, from Matt Anderson's estate. That was to be paid her absolutely, and then this \$1,500 a year, and she was to have the furniture and the house and the carriage, and they were to pay—my recollection now is—the insurance and taxes on the place. Now, after this conversation, I then remarked, 'I think I understand what you all want,' and I got up and left."

Also:

"*Question 2.* You say that something was said about Mr. and Mrs. Seat understanding that [at] his death the McWhirters were to have the property. Was this not said by the McWhirters, and not by Mrs. Seat?

"*Answer.* Yes, the McWhirters made the statement in Mrs. Seat's presence, and I understood her to assent to it."

"*Question 4.* Did not the McWhirters say in Mrs. Seat's presence, both on the occasion when you were there with them, and on the occasion when Messrs. McRea and Lupton were there; and did not George McWhirter, on the occasion last [mentioned], also say, in substance, as follows: 'We want to save Mrs. Seat all trouble in settling up this estate, and we want to see that she is properly cared for and maintained?'"

Answer. It was stated by the McWhirters, one or both, on one of the occasions, perhaps both, that they wished the amplest provisions made for Mrs. Seat, so that she should want for nothing, or have no trouble about her comfortable maintenance, but I do not remember their saying that they wished her to have no trouble about settling up the estate."

It will be observed that Colonel House states that this disposition of the property was spoken of on that occasion as understood between Mr. and Mrs. Seat. On cross-examination, Colonel House was asked if this remark was not made by the McWhirters, and not by Mrs. Seat. He replied: "Yes, the McWhirters made the statement in Mrs. Seat's presence, and I understood her to assent to it." Again, it was Colonel House's suggestion that a fixed, definite annuity should be provided for Mrs. Seat, rather than that she should depend upon one-third of the very irregular income of the estate. This was on account of the fact that the pear orchard had never produced any thing, and the orange grove in Florida sometimes failed to pay expenses.

Mrs. Seat does not remember the interview described by Colonel House, but she admits the subjects just mentioned were discussed at the final interview, when the deeds were signed. Colonel House, in the preparation of the deeds, inserted two clauses, especially designed for the protection of Mrs. Seat—to wit, first, that she should receive \$1,500 per

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annum, and more, if necessary to support and maintain her properly. Secondly, that all payments due for her support should be liens on all the Tennessee property conveyed. It appears that, on the day following the first interview, Colonel House, having prepared the deeds, took them to Mrs. Seat to be executed. All the parties were present. Colonel House states that he read over the deeds clearly and slowly. That Mrs. Seat expressed herself as satisfied, and signed them. C. B. Ewing, the Clerk who took her acknowledgment, states that, when he came in, Colonel House said: "I have explained them fully, and she understands their contents;" and that Mrs. Seat, in reply, said to him: "I understand and acknowledge them." Colonel House was asked: "What were the indications as to Mrs. Seat's mental capacity at the time of their interview?" He answered: "Well, I would say that it did not occur to me to question her capacity. She did not talk much, but, of course, I inferred that was attributable to her recent bereavement. She seemed, as far as I could judge, to be all right. I saw nothing to the contrary, or had any suspicion to the contrary."

Judge Tyler was called as a witness by counsel of complainant to testify in respect to her incapacity. Judge Tyler, as Judge of the County Court, called at Mrs. Seat's residence, the day the deeds were executed, and took her acknowledgment as surety upon the administrator's bond. This witness was interrogated especially as to

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Mrs. Seat's mental condition, and said she looked subdued and very sad, but that he could not speak as to her mental condition. The conveyance to the McWhirters was made after Judge Tyler's visit—on the same day. It is true, that one of the witnesses to the deeds, Mr. J. B. Osborn, did testify that Mrs. Seat said nothing to anybody, and acted in a dazed sort of way, and gives it as his impression that she lacked understanding at the time. This witness does not appear to have known Mrs. Seat very well, or to have been much in her company. Upon the other hand, Mr. Bryce Stewart, Mr. Garrard, Mr. McRae, Mr. Louis Anderson, Mr. Martin, and Mr. Ford—all old friends and some of them relatives of Mrs. Seat—were examined as witnesses in this case, and not one of them has testified even to a suspicion of Mrs. Seat's mental unsoundness or want of capacity or understanding.

Another phase of this case remains to be noticed. It appears that, after these conveyances were executed and registered, some dissatisfaction arose among the relatives of Mrs. Seat who were expectant heirs to this estate. It appears that a niece of Mrs. Seat talked to Mrs. Seat so much upon this subject, that, in the language of Mrs. Seat, it "nearly ran her wild." Mrs. Seat herself, up to this time, had expressed no dissatisfaction whatever, but serious imputations were cast upon the McWhirters by some of Mrs. Seat's relatives and friends.

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The McWhirters returned to Clarksville and arranged an interview with Mrs. Seat. Col. John F. House, Dr. Lupton (Mrs. Seat's pastor), Mr. McRae (president of a bank), and Miss Howard, all friends of Mrs. Seat, were invited to be present, and did attend the interview. Colonel House, in his deposition, describes what occurred at that interview. He states: "When I got to the house Miss Sallie Howard was in the room, Mr. Lupton, the Presbyterian minister, George McWhirter, Mr. McRae, F. P. and A. J. McWhirter. Mr. F. P. McWhirter stated to those persons present that there had been reports put out to the effect that he and his brother had come down there and overreached Mrs. Seat, and taken advantage of her position, and got her to convey her property to them, perpetrating a fraud on her, and this imputation he did not propose to rest under; he wanted to say, in the presence of all these persons there assembled, and before Mrs. Seat, that he would not, for all he and his brother were worth, do her an injury, or do any thing in reference to that property that did not meet with her approval, and wanted to say to her, in the presence of all these persons there, 'If you are dissatisfied with these conveyances, we stand ready to make any alteration in them you want to make—fix that property as you want it fixed, or any alteration that you want in it.' Well," says Colonel House, "he made quite a talk, protesting, or rather replying, to those charges which had been brought against him con-

cerning the property and his methods. I cannot, of course, repeat every thing he said now, but he wound up what he had to say by saying: 'Now, if you are dissatisfied with this thing, my brother and I are down here prepared to make any alteration or change, or fix this thing any way you want it fixed.' Well, Mrs. Seat made no reply to that that I heard at all. Miss Sallie Howard, as I now recollect, turned to Mrs. Seat, and said: 'Mrs. Seat, why don't you say what you want done?' I did not hear any reply to that. (A. J. McWhirter testifies that Mrs. Seat's reply was, viz.: 'I have not said that I want any thing done.') George McWhirter, the son of A. J. McWhirter, then said: 'Aunt Sue, understand that this is the proposition of the McWhirters; they are willing to make any alteration in regard to this property in these deeds that you want made, or convey this property back to you, and undo all that has been done.' Well," continues Colonel House, "Mrs. Seat still made no reply. George McWhirter went on further to say: 'If you ain't prepared now, Aunt Sue, just take your own time and think about the thing. If you have got any friends you want to consult, consult them. If you are not prepared to make any answer now, take your own time.' At that juncture I remarked to Mrs. Seat (I was at the first of the dissatisfaction of the thing, and had not heard any thing of the sort): 'Take your own time about this thing. You may have some friend you want to consult, or may, perhaps, want

to consult some attorney about this thing. Take your own time and give your answer, or take your course.'"

Colonel House further stated that, at the request of F. P. McWhirter, he stated in brief to the persons there assembled what the deeds contained and conveyed. He also narrated the conversation and discussion between them at the time the contract was drawn. Colonel House said further that when George McWhirter made the proposition, or offer, to cancel the deeds if Mrs. Seat desired it, both A. J. and F. P. McWhirter readily assented. Without doing any thing further, this interview closed, and the parties all retired.

It appears from the record the McWhirters left Clarksville that evening with no claim of dissatisfaction from Mrs. Seat, but with the standing proposition to alter or cancel the deeds if notified by Mrs. Seat that she was dissatisfied. Up to this time Mrs. Seat herself had not expressed any dissatisfaction. The defendants received no communication that Mrs. Seat desired any thing until the bill was filed, on the third of March, 1893, charging the defendants with gross fraud and deception in obtaining the deeds, and enjoining them against disposing of the property. The Chancellor found that the allegations of fraud in the bill are not sustained by the evidence, and in this conclusion we concur. We are of opinion the charges of fraud are wholly unwarranted, and without foundation in fact. The Chancellor, however, found that

Mrs. Seat was incapable of understanding and comprehending transactions of the magnitude of the one in question, and that she executed the two deeds ignorantly and without understanding the real contents and tenor of the same, and without consideration, and with the belief that she was doing an entirely different act by the execution of the papers. We are of opinion that the great preponderance of the evidence is against the finding of the Chancellor on the proposition last announced. We are of opinion Mrs. Seat was fully capable of understanding and appreciating what she was doing when she made the deeds, and did comprehend the nature of the transaction. The law upon the subject of capacity and undue influence is, that where the maker of a voluntary conveyance is capable of doing the act, and there is no fraud, no concealment, and no advantage taken, the Court will not interpose. *Hadley v. Latimer*, 3 Yer., 537; *Coffee v. Ruffin*, 4 Cold., 514.

The law does not require that persons shall be able to dispose of their property "with judgment and discretion" in order to the validity of a conveyance. It is sufficient if they understand what they are about. *Paine v. Roberts*, 82 N. C., 453 (1880).

The fact that grantees advised and encouraged the execution of the voluntary deeds, does not impair the validity of the instruments, unless the free agency of the grantor was destroyed.

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Stone v. Wilbern, 88 Ill., 108; *Roe v. Taylor*, 45 Ill., 485.

There is no ground shown in this record upon which the deeds should be annulled.

The decree of the Chancellor is reversed, and the bill is dismissed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

WESTERN DIVISION.

93	571
116	513

JACKSON, APRIL TERM, 1894.

HUNTER *v.* MEMPHIS.

(*Jackson. May 22, 1894.*)

1. TAXATION. *Effect of clause "in lieu of all other taxes."*

A statute imposing upon each insurance agent or firm doing business in this State a specific State privilege tax declared to be "in lieu of all other tax," repeals, by implication, an earlier statute levying a specific municipal privilege tax upon agents of foreign insurance companies doing business in a named taxing district.

Acts construed: Acts 1893, Ch. 89; Acts 1879, Ch. 84.

2. STATUTES. *Repeal by implication.*

Doctrine re-affirmed that repeals of statutes by implication are not favored, and that a later statute will not be held to operate as a repeal

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of an earlier one unless the repugnance and conflict between them is such that they cannot stand together.

Cases cited and approved: Insurance Co. v. Taxing District, 4 Lea, 644; Maney v. State, 6 Lea, 221; Knoxville v. Lewis, 12 Lea, 181; Ballentine v. Pulaski, 15 Lea, 633; The Druggist Cases, 85 Tenn., 450; Poe v. State, 85 Tenn., 495; Terrell v. State, 86 Tenn., 523,

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County. L. H. ESTES, J.

TURLEY & WRIGHT and MALONE & MALONE for Hunter.

METCALF & WALKER for Memphis.

CALDWELL, J. This is an agreed case between the city of Memphis on one side, and F. B. Hunter and F. W. Smith on the other side, involving the question of the liability of insurance agents to *municipal* privilege taxation.

The Circuit Judge decided the question in favor of the city, and Hunter and Smith appealed in error.

The Legislature of 1879 laid an annual *municipal* privilege tax of \$200, for each company represented, upon agents of foreign insurance companies having offices and doing business in the Taxing District of Shelby County. Acts 1879, Ch. 84, Sec. 7,

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Sub-sec. 54. The amount of that tax was reduced to \$100 per annum in 1881. Acts 1881, Ch. 96, Sec. 18.

The Taxing District of Shelby County having been abolished, ample taxing power, and the benefit of all laws imposing privilege taxes in her favor, were expressly conferred upon the city of Memphis, as her successor, by Sections 4 and 5, Chapter 84, Acts of 1893.

Subsequently, the general revenue bill of 1893 was passed; and, by the fourth section thereof, it was provided that each insurance agent or firm doing business in this State, in counties of 50,000 inhabitants or over, shall annually pay the sum of \$20 as a *State* privilege tax, "in lieu of all other tax." Acts 1893, Ch. 89, Sec. 4, pp. 123 and 134.

The plaintiffs in error have offices and do business in the city of Memphis, as agents of foreign insurance companies, Hunter representing two companies and Smith representing one. As such agents, each of them, in pursuance of the requirement of Section 4, Chapter 89, Acts of 1893, paid to the Treasurer of the State the sum of \$20, as a *State* privilege tax for the year 1894.

Thereafter, the city of Memphis demanded of them a *municipal* privilege tax of \$100 for each company represented, for the same year, 1894. This demand was made by virtue of Section 18, Chapter 96, Acts of 1881, already mentioned.

Hunter and Smith refused to pay the tax thus demanded, upon the ground, as contended by them,

that the law under which it was claimed had been repealed by the subsequent provision, under which they had paid the \$20 each to the State.

The Act of 1893 cannot operate as an *express* repeal of the Act of 1881, for the reason that it does not recite in its caption, or otherwise, the title or substance of the latter Act, as required by Section 17, Article II., of the Constitution. Such recital is essential to the validity of every *express* repeal; but not in case of *implied* repeals, the latter not falling within the constitutional requirement. If there be any valid repeal in the present instance, it must be *implied*. To constitute a repeal by implication, there must be such repugnance or conflict between the positive and material provisions of the different Acts that they cannot stand together. There is no such repugnance or conflict where one Act simply lays a municipal privilege tax, and another lays a State privilege tax, without more, upon the same person or business. Such Acts may co-exist without the slightest interference the one with the other, the two taxes being separate and distinct. The imposition of the one tax is not, of itself, an exemption from the other. It is entirely competent, if not usual, for the Legislature to require the same person or business to pay a *municipal* privilege tax and also a *State* privilege tax for the same period of time, or by the year. Indeed, both may be imposed by the same Act, or by different Acts.

The Act of 1881 laid a *municipal* tax, the Act

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of 1893 a *State tax*; and, if that were all, both would certainly be collectible. But that is not all. The Act of 1893 did not stop with the mere imposition of a tax in favor of the State; it went further, and said that the State tax thereby imposed should be "in lieu of all other tax." If, "in lieu of all other tax" (meaning privilege tax), then no other tax, previously laid, was thereafter authorized or valid.

It is true that there is not any repugnance or conflict between a mere *municipal tax* and a mere *State tax*; but there is the greatest possible repugnance and conflict between a *municipal tax* and a *State tax in lieu of all other tax*. They cannot co-exist.

A State privilege tax or a municipal privilege tax, upon a particular person or business, in lieu of all other tax, covers the whole domain of privilege taxation that the Legislature intends shall be occupied, and excludes every other privilege tax, as to such person or business, until further legislation with respect thereto shall be had. The phrase, "in lieu of all other tax," is a positive exclusion of every other privilege tax. It has no other office or meaning.

It follows, therefore, that the municipal privilege tax laid upon insurance agents by the Act of 1881 was impliedly repealed by that part of the Act of 1893 which imposed upon them a State privilege tax "in lieu of all other tax."

The doctrine of repeal by implication has been

recognized and applied in several decisions of this Court. *Home Insurance Co. v. Taxing District*, 4 Lea, 644; *Maney v. The State*, 6 Lea, 221; *Knoxville v. Lewis*, 12 Lea, 181; *Ballentine v. Pulaski*, 15 Lea, 633; *The Druggist Cases*, 85 Tenn., 450; *Poe v. The State, Ib.*, 495; *Terrell v. The State*, 86 Tenn., 523; etc.

In the first case mentioned, it was held that the words, "which shall be in lieu of all other taxes," occurring in the Act of 1875, were themselves impliedly repealed by the Act of 1879, which imposed an additional tax.

Reverse, and enter judgment here for plaintiffs in error.

* GROSVENOR¹ v. BETHELL.

(Jackson. June 4, 1894.)

1. MORTGAGE. *Of opera-house.*

A mortgage by an incorporated opera-house company, made after purchase of lot and while theater buildings are in course of erection thereon, conveying the lot "and all the buildings and improvements thereon, or to be erected thereon," operates to pass all furniture, fixtures, and furnishings then or thereafter placed in the theater building and essential to its successful operation. (*Post*, pp. 585-587.)

Case cited and approved: *Halley v. Alloway*, 10 Lea, 524.

2. SAME. *Liability for taxes.*

The purchaser of real estate at mortgage sale is liable for taxes accrued thereon for the year of the sale, which are not due and have not been assessed at that date, when the mortgage, though containing covenant against incumbrances, provides that "all past-due taxes" shall be paid out of the purchase-price, and public announcement is made at the sale that the purchaser must pay the taxes of that year. (*Post*, pp. 587, 588.)

3. SAME. *Purchaser's claim to rents of leased property.*

The purchaser at mortgage sale of an opera-house then leased for a rental payable in quarterly installments, is not entitled to that portion of a quarter's rental that accrues between date of sale and the date of his full compliance with its terms, when the purchaser is the sole cause of delay. (*Post*, p. 588.)

4. TAXATION OF COSTS. *Is a matter of discretion.*

The taxation of costs in equity causes is very largely in the discretion

* For a note on the question when taxes become a lien or incumbrance on land, see *Craig v. Summers*, 15 L. R. A., 236.

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of the Chancellor, and will not be disturbed unless there has been manifest and palpable abuse of that discretion. (*Post*, pp. 588, 589.)

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
W. D. BEARD, Ch.

METCALF & WALKER for Complainants.

TURLEY & WRIGHT, H. C. WARINNER, D. E. MYERS, and W. M. RANDOLPH & SONS for Defendants.

BRIGHT, J. This was a bill filed in the Chancery Court of Shelby County by Charles N. Grosvenor and Noland Fontaine, as trustees under *two* mortgages executed to them by the Grand Opera-house Company, against W. D. Bethell, the purchaser of the Grand Opera-house at a sale made under the first mortgage; also against the Continental National and First National Banks of Memphis, as representing the first mortgage bondholders; also against the Grand Opera-house Company; also against W. M. Randolph and others, representing the interest of the second mortgage bondholders; and also against Fritz Staub and other lessees of the Grand Opera-house building—

First.—To determine whether or not all the taxes on the Grand Opera-house building, etc., for the year 1893, should be paid by said trustees out of the proceeds of the sale under the first mortgage, said sale having taken place on the eighteenth of March, 1893.

Second.—To determine whether or not Bethell, the purchaser at said first mortgage sale, thereby acquired title to all the theater furniture and fixtures, the same having been specifically embraced with the original property, in a second mortgage executed to secure second mortgage bonds.

Third.—To determine whether Bethell, as such purchaser, acquired title to all the rents on the property bought by him accruing after the date it was struck off to him, viz., March 18, 1893, or only from the day the trustee's deed was executed to him, viz., April 1, 1893.

Fourth.—To fix incidentally the trustee's compensation.

W. D. Bethell filed an answer and cross-bill alleging that, as purchaser, he acquired title to the theater lot, building, and all the improvements, furniture, and fixtures, to the exclusion of those claiming interest therein under the second mortgage; and also that he was entitled to a *pro rata* share of the rents counting from and after March 18, 1893, the day of sale, and asking for an injunction enjoining any sale under the second mortgage, which was then advertised to take place at an early day, and which injunction was granted.

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The two banks representing the first mortgage bondholders filed their answer to said original bill and the Bethell and Staub cross-bills, insisting that they were entitled to the proceeds of the sale under the first mortgage, without diminution for the taxes of 1893, the fund not being liable for same by any contract or otherwise.

W. M. Randolph filed his answer, as a second mortgage bondholder, etc., to said original and cross bills, alleging, among other things, that the theater furniture and fixtures were not embraced in the first mortgage, and did not pass to Bethell by a sale thereunder, but were only embraced in the second mortgage, and the bondholders under such mortgage had the right to their proceeds.

Fritz Staub and others, lessees, etc., filed their answer and cross-bill, admitting the lease to them of the theater, etc., but claiming, among other things, that the Grand Opera-house Company had violated its lease to them by causing them to be dispossessed under the first mortgage sale, to their serious damage, and seeking to recoup their damages against the rent notes.

The cause was heard, and the Chancellor adjudged:

First.—That the proceeds of sale under the first mortgage were not liable to pay the said taxes for 1893, and practically dismissing said original and cross bills as to them, with costs.

Second.—That the defendant, Bethell, acquired title, not only to the theater building proper, and the lots on which it was located, but also to all

the theater furniture, furnishing and fixtures, and made perpetual the injunction against a sale thereof under said second mortgage; and, further, that the complainants, as trustees, were entitled to all monthly rents, payable in advance, up to the first of April, 1893.

Third.—That said Staub *et al.*, lessees, whose rent was payable in quarterly installments of \$1,500 each, had a right to recoup their damages for a violation of their lease against the rent note for \$1,500 due April 1, 1893, and ordered a reference for this purpose.

Fourth.—That complainants and their surety on cost bond pay two-thirds of the costs, to be refunded to them only out of proceeds of any sale under the *second* mortgage, and the defendant, Bethell, pay the remaining one-third of the costs.

The complainants and certain second mortgage bondholders appealed from so much of said decree as gave Bethel the right to the theater, furniture, and fixtures by purchase under the first mortgage sale, and as held the lease broken, and allowed Staub to recoup his said damages against his liability on the \$1,500 rent note due April 1, 1893.

The defendant, W. D. Bethell, appealed from so much of the decree as held that the proceeds of the first mortgage sale were not liable to pay all the taxes—State, county, and municipal—for 1893, rents, etc.

The cause is now here on these two special ap-

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peals, and errors have been assigned by the appellants respectively—viz., by complainants, as trustees for the *second* mortgage only, the first mortgage having no interest in such appeal, and by the defendant, Bethell, as to the matter of taxes for 1893, in which the first mortgage is concerned, and as to rents, etc.

The Grand Opera-house Company is a Tennessee corporation, and was organized in the year 1889, with a view of buying a lot and erecting a theater thereon. It bought a lot on the south-west corner of Beale and Main Streets, Memphis, Tennessee, about 100 by 228 feet, but somewhat irregular in shape, and commenced the erection of the building. Early during the progress of the building, and on January 1, 1890, the Grand Opera-house Company executed a first mortgage or trust-deed to Chas. N. Grosvenor and Noland Fontaine, as trustees, on certain of its properties—to-wit: A lot, building, and improvements, to secure the payment of \$90,000 of its six per cent. coupon bonds, being ninety bonds in number, for \$1,000 each.

The mortgage was duly acknowledged and registered, and the bonds authorized thereunder duly issued and negotiated, and the Continental and First National Banks now represent the holders of said bonds. This first mortgage contained the warranty of the Grand Opera-house Company, as maker, that the property was free from all incumbrances. The trustees thereunder were instructed to make

sale in case of default, and were directed to apply the *proceeds* of sale, first, to costs and expenses; second, "to the payment of any taxes that may remain unpaid and due on the property sold and conveyed;" third, to the payment of the mortgage bonds and interest.

Upon this covenant against incumbrances, and these directions to the trustees as to the application of the proceeds of sale, Bethell alone bases his contention that the taxes for 1893 should be paid out of the proceeds of the sale under said first mortgage.

On the eleventh of December, 1891, the Grand Opera-house Company leased the theater proper, with all its fixtures and furnishings, for three years, beginning with July 1, 1892, to Fritz Staub and associates for a rental of \$6,000 per year in quarterly installments of \$1,500 each, payable at the end of each quarter, with an agreement for use and occupation during the *term*.

On the ninth of July, 1892, the opera-house company executed another mortgage or trust deed to the same trustees, on the same lot, building, and improvements mentioned, being a second mortgage with respect to the same, and embracing also certain additional realty outside of the theater building, and likewise embracing specifically all the furniture and fixtures in or belonging to the Grand Opera-house Company, enumerating same, for the purpose of securing eighty bonds of five hundred dollars each. This second mortgage was duly ac-

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knowledge and registered, but probably only about \$14,000 of the bonds thereunder were issued and negotiated.

The Grand Opera-house Company defaulted in the payment of its interest on the first mortgage bonds, so that, at the request of the first mortgage bondholders, the said trustees, in compliance with their powers, properly advertised the property embraced in said first mortgage for sale, and sold same at public auction, for cash, on the eighteenth of March, 1893, the same being struck off to W. D. Bethell at \$100,000.

The sale advertisement, among other things, notified the public that "all *past-due* taxes will be paid out of the purchase-money. We believe the title to said property is good, but we will sell and convey only as trustees."

Charles N. Grosvenor, one of the trustees, acted as the auctioneer at said sale, and, before inviting bids, announced that all unpaid State, county, and municipal taxes up to 1892, inclusive, would be paid out of the fund, but that the purchaser would be required to pay all taxes for the year 1893.

Mr. Bethell was present at said sale, and was within ten or twelve feet of the auctioneer at the time of the announcement, and, if he did not hear it, in fact could have heard it. He had, however, seen the original first mortgage, and had signed and executed it, as the president of the Grand Opera-house Company, and had also seen and read the sale advertisement.

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Mr. Bethell's absence from Memphis immediately after the sale, the examination of the title to the property by his attorney, and the objections of his attorney to drafts of deeds, and other matters for which trustees were not responsible, delayed the acceptance of the trustee's deed by Bethell until April 1, 1893.

Mr. Bethell, under the advice of his attorney, would not close the matter until the trustees entered into a written agreement with him to retain \$3,000 of the proceeds of sale in their hands until the question of the taxes for 1893 was settled by agreement or litigation. The trustees retained about \$10,000 of proceeds of sale for this and other purposes.

Mr. Bethell originally asserted his right to the theater furniture and fixtures, and to rents from March 18, 1893, in hostility to the claims of Grosvenor and Fontaine, as trustees under the second mortgage, and which property the trustees had advertised, or were about to advertise, for sale under said second mortgage. The trustees and Bethell also failed to agree about the taxes of 1893, and they therefore filed the present bill.

Bethell paid \$10,000 cash on day of sale, to wit, the eighteenth of March, 1893, but did not accept the deed and pay the remaining amount of the purchase-money, \$90,000, until April 1, 1893.

The first contention, or assignment of error of complainant to Chancellor's decree, is that the Chancellor was in error in holding and decreeing

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that Bethell was entitled to all the furniture, fixtures, and furnishings inside of and belonging to the theater building. The mortgage under which Bethell purchased contained the following provisions, etc., after describing the lot, it says: "*And all the buildings and improvements thereon, or to be erected thereon.*"

As has been stated, the Grand Opera-house Company was organized and chartered for the purpose of purchasing a lot and to construct thereon a Grand Opera-house. That was the purpose of the building, and it was equipped with all its fixtures, furniture, carpets, and paraphernalia complete as a going concern, an opera-house ready for performances in September, 1890. All of the furniture, fixtures, furnishings, and paraphernalia were necessary, and a part of said buildings, to make it a complete opera-house, and, as such, it was used and operated by the Grand Opera-house Company during the seasons of 1890, 1891, and 1892, when, in July, 1892, it was leased by Defendant Staub and his associates for three years. Now, the intention of the parties was to build and erect an opera-house complete. The whole building is to be considered in reference to its uses, and such a house, when erected and furnished for the purposes designed, makes up the building and improvements contemplated in the mortgage. 10 Lea, 524; 3 Tenn. Ch., 584.

Numerous authorities might be cited holding this doctrine, but it is useless, as we regard the

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case of *Halley v. Alloway*, 10 Lea, 524, as settling this question; and we are unable to distinguish that case, in principle, from the present case. We therefore hold this assignment of error not well taken, and the Chancellor's decree was correct in holding that Bethell was entitled to the fixtures, furniture, etc., under his purchase, and that same passed to him.

The other ground or assignment of error of complainants is in regard to taxation of costs. This will be considered hereafter in connection with defendant Bethell's assignment of error in regard to taxation of costs.

The defendant, Bethell, assigns as error, first, the action of the Chancellor in decreeing that the taxes for 1893 must be paid by Bethell, and not by the trustees. In this the Chancellor was correct. While under our statute the taxes are assessed to the owner on the tenth of January of the year for which the property is assessable, but, while this is so, in this case the mortgage provides that the trustees are to pay "any taxes that may remain unpaid and due on the property sold and conveyed, or any part thereof." The taxes for 1893 were not due on day of sale, nor were they even assessed at that time. Besides this, the sale advertisement, among other things, notified the public "that *all past due taxes* will be paid out of the purchase-money," and, in addition to this, one of the trustees, and the auctioneer at the sale under which Bethell purchased, announced just before

said sale that all unpaid State, county, and municipal taxes up to 1892, inclusive, would be paid out of the fund, but that the purchaser would be required to pay all taxes for the year 1893. Bethell read the sale advertisement, was present at the sale, bid on and purchased the property, and must have known the terms of sale. The contract was clearly announced that the purchaser must pay all the taxes on said property for the year 1893. Thus it will be seen the property was sold and purchased with this understanding. The Chancellor was correct in holding that Bethell must pay the taxes for 1893, and that said funds in the hands of the trustees were not liable to pay same. Hence, it follows that this assignment of error is not well taken.

Bethell insists, by his next assignment of error, that he is entitled to the rents accruing on this property from March 18, 1893, date of his purchase, up to April 1, 1893, the day he accepted the deed and went in possession. Bethell did not pay all the purchase-money, some ninety thousand dollars remaining unpaid until April 1, 1893. He was the cause of the delay. He paid no interest on the balance of purchase-money. It was his fault, or delay, that he did not get his deed earlier; and we can see no reason why he should be entitled to the rents, and the Chancellor was correct in holding he was not entitled to same.

We now come to consider the question of taxation of costs by the Chancellor, raised by assign-

ment of errors of complainants and defendant, Bethell. The Chancellor taxed complainants with two-thirds of the costs, to be paid out of proceeds of sale under second mortgage, and defendant, Bethell, with one-third of the costs. The taxation of costs in equity cases is very largely in the discretion of the Chancellor, and this Court will not ordinarily disturb the taxation made by him. Very much of the costs accrued at the instance of Bethell.

In regard to his contention on his cross-bill in regard to taxes for 1893, rents, and his injunction, etc., we think the Chancellor was correct in his taxation of the costs.

All of the assignment of errors of both complainants and defendant will be overruled, and the decree of the Chancellor in all things will be affirmed, and the cause remanded for the execution of the reference ordered by the Court, etc.

The complainants will pay one-half of the costs of this Court out of funds arising from sale under second mortgage, and defendant, Bethell, the other remaining one-half of the costs. The costs of the Court below will be paid as adjudged by the Chancellor.

Milan Milling, etc., Co. v. Gorten.

MILAN MILLING, ETC., Co. v. GORTEN.

(*Jackson*. October 8, 1894.)

FOREIGN CORPORATIONS. *Their acts of interstate commerce valid and enforceable.*

Where a foreign manufacturing corporation that has not complied with our statutes by registering its charter, contracts with a resident to furnish, deliver, and put in position for him within this State certain mill machinery, and accepts for the work and materials furnished the purchaser's notes for deferred payments, secured by mortgage upon real estate situated within this State, the transaction constitutes interstate commerce, which is not subject to regulation by State laws, and the notes and mortgage are valid and enforceable.

Acts construed: Acts 1891, Ch. 122; Acts 1877, Ch. 31.

Case cited and approved: 113 U. S., 727.

Cited and distinguished: *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn., 587.

FROM GIBSON.

Appeal from Chancery Court of Gibson County.
H. J. LIVINGSTON, Ch.

S. F. RANKIN, Jo. R. HAWKINS, and ED SMITH
for Complainant.

WALKER & BIGGS for Defendant.

McALISTER, J. The original bill in this cause
was filed in the Chancery Court of Gibson County

by the Milan Milling and Manufacturing Company against W. E. Gorten *et al.*, for the purpose of enjoining the collection of four notes, and the foreclosure of a deed of trust made to secure them.

In the year 1892, the Milan Milling and Manufacturing Company entered into a written contract with the Maish & Gorten Manufacturing Company, a foreign corporation, having its office and principal place of business at Warsaw, in the State of Indiana, whereby the latter company stipulated to manufacture, deliver, and put in position for the former company, at Milan, in the State of Tennessee, certain milling machinery. The price agreed to be paid by the Milan Milling and Manufacturing Company was \$5,334—viz., \$1,897 in cash, upon the arrival of the machinery at the mill, \$486 in sixty days, \$750 in six months, \$750 in twelve months, and \$750 in eighteen months from April 15, 1892, all evidenced by promissory notes.

The Milan Milling and Manufacturing Company further agreed to execute a first mortgage upon the milling property and lot to secure said deferred payments. In compliance with their agreement, the Maish & Gorten Manufacturing Company furnished said machinery, and adjusted it in the mill building at Milan, and the same was accepted by the Milan Milling and Manufacturing Company. The cash payment was made, and notes executed for the deferred payments, which were secured by a first mortgage on the milling property. Shortly after the execution of the notes, they were in-

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dorsed by the Maish & Gorten Manufacturing Company to the State Bank of Warsaw, Indiana. Default having been made by the Milan Milling and Manufacturing Company in the payment of the first note, the trustee advertised the property to be sold in accordance with the provisions of the deed of trust. Thereupon, the Milan Milling and Manufacturing Company filed their original bill to enjoin the sale, alleging that the Maish & Gorten Manufacturing Company had breached their contract in the manufacture and delivery of said machinery, in consequence whereof, the Milan Milling and Manufacturing Company had been greatly damaged, and, in accordance with the prayer of the bill, an injunction issued, restraining the trustee from selling the property.

The State Bank of Warsaw, in its answer, denied all the material allegations of the bill, claiming to be an innocent purchaser of said notes for value before maturity, in due course of trade, and by cross-bill prayed a foreclosure of the deed of trust.

It appeared in proof that the Maish & Gorten Manufacturing Company and the State Bank of Warsaw are both foreign corporations, chartered under the laws of the State of Indiana, and that neither company has ever complied with the laws of the State of Tennessee requiring foreign corporations, before doing business in this State, to register their charters.

Upon final hearing, the Chancellor was of opin-

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ion, and so decreed, that both the State Bank of Warsaw and the Maish & Gorten Manufacturing Company, being foreign corporations, and not having complied with the laws of Tennessee, the said contract to furnish machinery was non-enforcible, and that the deed of trust having been executed in violation of said statute, complainant in the cross-bill, the said State Bank of Warsaw, was not entitled to have same foreclosed.

The Chancellor, however, was of opinion that the State Bank of Warsaw was a *bona fide* purchaser for value, before maturity, of the notes in question, and, as such, was entitled to a decree against the Milan Milling and Manufacturing Company on the two notes which had matured at the date of filing the cross-bill. The Chancellor further decreed that the complainants in the original bill, to wit, the Milan Milling and Manufacturing Company, acquired no such jurisdiction over the Maish & Gorten Manufacturing Company as would entitle them to a decree against the latter for a breach of the contract, but the Court decreed that the injunction be made perpetual so far as it sought to enjoin the sale of said milling property by the trustee.

The Milan Milling and Manufacturing Company appealed from so much of said decree as adjudged it liable upon said notes. The State Bank of Warsaw appealed from so much of said decree as refused a foreclosure of the deed of trust on the milling property for the satisfaction of said notes.

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The assignment most earnestly pressed and elaborately argued by counsel for the State Bank of Warsaw is, that the Chancellor erred in finding that the Maish & Gorten Manufacturing Company was doing business as a foreign corporation in violation of the statutes of this State. It is insisted that the said Maish & Gorten Manufacturing Company do not come within the purview of these laws, for the reason that this company has no office or agency in the State, and is not engaged in carrying on business in the State of Tennessee. It is insisted on behalf of appellants that this corporation is engaged in interstate commerce—that is, manufacturing mills and milling machinery in the State of Indiana, and in selling the same by their agents or upon orders in the different States of the Union; that all its transactions with the Milan Milling and Manufacturing Company were acts of interstate commerce, the regulation of which belongs exclusively to the domain of the Congress of the United States, and that the construction of the statute contended for would render it void, because it would thereby involve an interference with interstate commerce.

In the case of the *Cooper Manufacturing Co. v. Ferguson*, 113 U. S., 727, it appeared that the Constitution of Colorado provided that no foreign corporation should do any business within the State without having one or more known places of business, and an authorized agent or agents in the same, upon whom process might be served. The

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Legislature of the State enacted that foreign corporations, before being authorized to do business in the State, should file a certificate with the Secretary of State and the Recorder of the county in which the principal business was carried on, designating the principal place of business, and the agent there, on whom process might be served. These provisions of the Constitution and statute law of the State of Colorado being in force, the Cooper Manufacturing Company, a corporation organized and existing under the laws of the State of Ohio, and having its principal place of business at Mount Vernon, Ohio, sent an agent into the State of Colorado, and entered into a contract, in writing, with the defendants, who were citizens of Colorado, by which it was agreed that the Ohio corporation should sell and deliver to the defendants, citizens of Colorado, a steam-engine and other machinery. Default having been made by defendants in payment, the plaintiff brought suit to recover of the defendants damages for their breach of the contract. It was held by the State Court of Colorado that plaintiff could not recover, because it appeared that said foreign corporation had not complied with the law of the State in respect to filing a certificate with Secretary of State and the Recorder of the county in which the principal business was carried on.

Upon writ of error to the United States Supreme Court, it was held that the facts of the case did not constitute a carrying on of business in Colorado,

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and was not forbidden by its constitution and law. Mr. Justice Matthews, in delivering a concurring opinion, stated, we think, the correct basis of the judgment of the Court. He said, viz.: "Whatever power may be conceded to a State to prescribe conditions on which foreign corporations may transact business within its limits, it cannot be admitted to extend so far as to prohibit or regulate commerce among the States; for that would be to invade the jurisdiction which, by the terms of the Constitution of the United States, is conferred exclusively upon Congress. In the present case," he continued, "the construction claimed for the constitution of Colorado, and the statute of that State, cannot be extended to prevent the plaintiff in error, a corporation of another State, from transacting any business in Colorado which, of itself, is commerce. The transaction in question was clearly of that character. It was the making of a contract in Colorado to manufacture certain machinery in Ohio, to be there delivered for transportation to the purchasers in Colorado. That was commerce, and to prohibit it, except on conditions, is to regulate commerce between Colorado and Ohio, which is within the exclusive province of Congress." The Judge continues: "*It is quite competent, no doubt, for Colorado to prohibit a foreign corporation from acquiring a domicile in that State, and to prohibit it from carrying on within that State its business of manufacturing machinery. But it cannot prohibit it from selling in Colorado by contracts made there,*

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its machinery manufactured elsewhere, for that would be to regulate commerce among the States."

It has been suggested that the case of *Cary Lombard Lumber Company v. Thomas*, 8 Pickle, is in conflict with this view. Such supposition is erroneous, and is based upon an entire misconception of that case. The Court, in the *Cary Lombard* case, was not dealing with interstate commerce. No such question was presented by the record in that case. On the contrary, it distinctly appeared in evidence that the *Cary Lombard Lumber Company* had an office and lumber yards in the city of Memphis, and was actually engaged in carrying on business in this State. It had acquired a *situs* and domicile in the State, and was, of course, subject to the regulations of our statute.

In the case at bar, the *Maish & Gorten Manufacturing Company*, a foreign corporation, had simply contracted with citizens of Tennessee to furnish certain milling machinery, and to adjust it in position in the mill. This company was in no sense engaged in carrying on its business in this state, but was engaged in an act of interstate commerce. In this respect the decree of the Chancellor is reversed, and a decree will be entered in favor of the State Bank of Warsaw on all of the notes, which in the meantime have matured, and for a foreclosure of the deed of trust made to secure them.

Wallace v. Goodlet.

WALLACE v. GOODLET.

(*Jackson*. December 31, 1894.)

1. USURY. *Vitiates deed of trust, when.*

A deed of trust is void for usury, which provides for payment of interest upon the loan therein secured at a rate exceeding six per cent., by this clause, to wit: "The interest on the above loan of \$2,200 is \$13.50 per month, to be paid at the end of each and every month."

2. SEPARATE ESTATE. *Parol evidence inadmissible to charge, when.*

Where a married woman's note does not, upon its face, bind her separate estate, parol evidence is not admissible in a suit to *collect*, not to *correct* it, to show that, contemporaneously with its execution, she agreed that it should be a charge upon her separate estate.

Cases cited: *Jordan v. Keeble*, 85 Tenn., 412; *Ragsdale v. Gossett*, 2 Lea, 730.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
W. D. BEARD, Ch.

GANTT & PATTERSON and TURLEY & WRIGHT for
Wallace.

WM. M. RANDOLPH & SONS for Goodlet.

McALISTER, J. The original bill in this cause claimed that, by virtue of a certain deed from W. P. Wallace, trustee, to complainant, Mary A.

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Wallace, the latter became owner in fee of certain real estate, and was entitled to possession, and that defendants were illegally withholding the same from her. The bill prayed in the alternative that a decree be given against the defendants for the recovery of the said property; and, if not entitled to this relief, then that plaintiff may have a decree for the sale of said property, so as to pay off complainant's debt.

The facts necessary to be noticed are that, on May 26, 1890, the defendants, M. E. and H. E. Goodlet, executed a trust-deed on lots 108 and 110, Market Street, in the city of Memphis, to Wm. Wallace, trustee, for the purpose of securing the note of M. E. and H. E. Goodlet for the sum of \$2,200, due May 1, 1891. Among other things, the deed of trust contained the following provision, to-wit: "The interest on the above loan of \$2,200 is \$13.50 per month, to be paid at the end of each and every month." This stipulation in respect to interest, being at a rate exceeding six per cent., rendered the deed of trust usurious on its face, and therefore non-enforceable. The Chancellor so decreed.

It appears that, on the hearing and after the cause had been partially argued, the counsel representing complainants asked leave to file an amended bill, which was granted. It was charged in this amended bill that all the property of Mary E. Goodlet belonged to her as her separate estate, with full power to charge the same, by virtue of

a marriage contract entered into between her and the defendant, Henry E. Goodlet, before their marriage. The bill alleged that the trust-deed was executed with the distinct understanding that the amount secured—to wit, the sum of \$2,200—was to be an express charge and lien on the Market Street property, which was the separate estate of the said Mary E. Goodlet. The amended bill prayed that if a sale of this property could not be had under the trust-deed, on account of the usury appearing on its face, then that the plaintiff therein was entitled to a decree for the sale of the said property by virtue of the verbal agreement which Mary E. Goodlet had made binding the said separate property to pay said indebtedness.

It is insisted in argument that the trust-deed did not destroy the original agreement, by which the debt was to be a charge on the Market Street lots. We are referred to the case of *Ottenheimer v. Cook*, 10 Heis., 313, in which the effect of a note, usurious on its face, was discussed. The Court said: "As between the original parties, a note, usurious on its face, does not operate to extinguish the debt, because it could not be used by either of the parties in evidence. If the payee had sued on the original consideration, he could not have used the note to establish the debt, nor could the maker have used it to show that the pre-existing debt was extinguished."

The insistence of counsel, therefore, is that the

deed of trust must be eliminated entirely, as a factor in the investigation of the case, and the Court can then look to the original transaction between the parties and enforce their agreement, if it appears equitable to do so. The contention of complainant is that, on May 1, 1890, the defendant executed her note to the complainant for the sum of \$2,200, agreeing, at the time, that her separate property on Market Street should be bound for its payment, and that this agreement can be enforced, and is not affected by the deed of trust providing for usurious interest, which was afterwards executed. We think this position untenable, for two reasons: (1) When we look to the note, executed by this married woman, we find no provision on the face of it binding her separate estate; and it has been held by this Court that, in such a case, parol evidence is not admissible to show that, at the time of the execution of the note, it was agreed by the married woman that her separate estate should be bound. *Jordan v. Keeble*, 1 Pickle, 412; *Ragsdale v. Gossett*, 2 Lea, 730. But, if the proof outside the trust-deed is looked to, it shows, in our opinion, that Mrs. Mary E. Goodlet made no verbal charge against her separate estate for the indebtedness. Mrs. Goodlet swears positively that the only thing she said was that she was willing to execute the trust-deed on the Market Street property. She denies that she charged her separate estate in any manner whatever, except as provided in the deed of trust.

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Mrs. Wallace, the complainant, does not contradict Mrs. Goodlet, but, on the contrary, confirms the former's statements. Mrs. Wallace says they had several conversations looking toward the execution of the trust-deed. On cross-examination, she stated the only thing Mrs. Goodlet had said was that she would execute the trust-deed. .

From the evidence, it is plain that no charge was made by Mrs. Goodlet except what might appear from the trust-deed. Everything that was said and done was in reference to the trust-deed which was to be executed. Such being the case, the only thing that can be looked to to show a charge against the estate of Mrs. Goodlet is the trust-deed itself. Since that instrument is illegal and non-enforcible, the complainant is entitled to no relief.

The decree of the Chancellor is affirmed.

Gwynne v. Memphis Appeal-Avalanche Co.

GWYNNE v. MEMPHIS APPEAL-AVALANCHE CO.

(Jackson. December 31, 1894.)

1. SUPERSEDEAS. *Of interlocutory decree of Chancery Court by Supreme Court.*

The interlocutory decree of a Chancery Court, rendered in a general creditor's proceeding before adjudication of the rights and priorities of creditors, directing sale of the insolvent debtor's property, consisting of a going daily newspaper plant and its appurtenances in the hands of and conducted by a receiver of the Court, will not be superseded by this Court, on application of the insolvent debtor based upon the ground that the decree will deprive him of his property without a hearing on the merits, where it appears that the debtor's assets are grossly insufficient to pay his debts, and rapidly depreciating in value, and in great peril of utter loss or destruction if sale should be delayed until final hearing.

Code construed: § 4701 (M. & V.); § 3933 (T. & S.).

Cases cited: *Redmond v. Redmond*, 9 Bax., 561; *Blake v. Dodge*, 8 Lea, 464; *Railroad v. Huggins*, 7 Cold., 217.

2. RECEIVER. *Of newspaper.*

While a Chancery Court has the power to appoint a receiver to manage and conduct the publication of a newspaper, it "will not take upon itself the responsibility of continuing the publication of a political paper by a receiver any longer than is absolutely necessary to prevent a sacrifice of the property."

Cases cited: 4 Paige, 480; 17 How. Pr., 510; 17 W. R., 425.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
W. D. BEARD, Ch.

HOLMES CUMMINS, WM. H. CARROLL, W. A. PERCY,

Gwynne v. Memphis Appeal-Avalanche Co.

CASEY YOUNG, MORGAN & MCFARLAND, and PERES & LEHMAN for Complainants.

METCALF & WALKER, GANTT & PATTERSON, and ADAMS & TRIMBLE for Memphis Appeal-Avalanche Co.

MCALISTER, J. This is a petition asking the Court to vacate or suspend an interlocutory decree of the Chancery Court of Shelby County, ordering a sale of the *Memphis Appeal-Avalanche* property pending proceedings in these consolidated cases. The decree complained of was passed on April 6, 1894, and recites that, because of the insolvency of the defendant, the Memphis Appeal Company, and because the business of conducting the newspaper, the *Memphis Appeal-Avalanche*, and its publication, has not been and is not self-supporting, and its receipts are insufficient to meet and defray the cost and expense incident thereto, and that the value of said newspaper property, and the security of the complainant creditors, has been and is being deteriorated under its conduct by this Court through its receiver, in that the necessary cost and expenses thereof exceed its income and earnings; that, for these several reasons, it is to the manifest interest of all the parties that said newspaper and property should be sold. The sale was advertised to take place Monday, June 4, but on Friday, June 1, last, the Chancellor ordered a postponement of the execution of the order of sale until Saturday, June 16. This order of sale was

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made in pursuance of proceedings which originated in the following manner:

On June 7, 1892, the Memphis Appeal Company executed a deed of trust to the Memphis Trust Company to secure the payment of \$200,000, in bonds of \$1,000 each. This trust-deed was duly recorded, on July 27, 1892, in Shelby County, the home of the corporation. The bonds were issued thereunder, and are now owned by Mrs. Alice T. Collier and James B. Loving.

It further appears that, on September 20, 1893, more than a year thereafter, the Appeal Company executed a second mortgage, on a part of the same property embraced in the first trust-deed, to complainants, A. D. Gwynne and R. J. Morgan. Gwynne and Morgan, as such trustees, filed the original bill in this cause, and procured the appointment of W. J. Chase as receiver. Thereafter, Jacob Fink filed his bill, which the Court made a general creditors' bill. James P. Myrick also filed a bill, representing the employes of the Appeal Company. These causes were consolidated with the Gwynne and Morgan bill, and the complainants procured the appointment of said Chase as receiver in each of said causes.

It should be stated in this connection that S. C. Beckwith, one of the defendants to the original bill filed by the trustees, Gwynne and Morgan, attempted to remove said cause to the United States Circuit Court for the Western Division of the State. The petition was denied by the Chan-

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cery Court of Shelby County. Thereupon, said Beckwith filed a transcript of said cause in the United States Circuit Court, which Court refused to remand said cause to the State Court, and hence the United States Court and the Chancery Court of Shelby County have both assumed jurisdiction of said cause, and both Courts acting together have rendered similar orders of sale, and have appointed their respective Clerks—E. B. McHenry and John B. Clough—special commissioners. There is no collision between the State and United States Courts, but they are acting concurrently and harmoniously.

The Appeal Company answered the bill, denying that the trust-deed to Gwynne and Morgan was lawfully executed. It denied that the debts embraced in said trust-deed were the debts of the corporation, excepting the sum of \$14,475. It is claimed in the answer that the president of said corporation, the Memphis Appeal Company, was never authorized by any board of directors or by the stockholders to execute said alleged deed of trust to Gwynne and Morgan; that the said alleged trust-deed to Gwynne and Morgan is without and beyond the power of the said Memphis Appeal Company corporation to execute under the laws of the State of Tennessee, and is *ultra vires* and void; that said trust-deed was executed for the alleged purpose of securing the sum of \$56,405, when, in truth and in fact, nearly all of said sum is made up of amounts claimed to be due the

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beneficiaries from other persons than said Memphis Appeal Company. It is not necessary, however, to notice more specifically the issues of the controversy, since those issues are not now reviewable. The only question presented is whether the Chancellor erred in his interlocutory order of sale. The grounds upon which this Court is asked to supersede the interlocutory order is that none of the rights of the parties or priorities of the conflicting lien-holders have been settled by the Court. It is insisted that the holders of the \$200,000 in bonds secured by the first trust-deed executed by the Appeal Company to the Memphis Trust Company claim prior liens, and do not desire a sale of the property; while, on the other hand, the creditors secured by the Morgan and Gwynne trust-deed also claim priority. The beneficiaries in both of said trust-deeds claim priority, and their rights have not been adjudicated. It is also insisted that none of the general creditors in the Fink bill or the employes in the Myrick bill have any kind of lien, by attachment under the statute or otherwise, on any of the property advertised to be sold; that none of the rights of the parties or priorities of the conflicting lien-holders have been settled by the Court.

The question presented for the decision of the Court is whether the interlocutory decree of sale is, under the statute, a decree which deprives these petitioners of property by interlocutory order, in advance of a determination of the rights and in-

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terests of the parties in such property. Section 4701 (M. & V. Code) provides, viz.: "The Supreme Court in term, or either of the judges in vacation, may grant writs of *supersedeas* to an interlocutory order or decree," etc. This statute has been frequently construed by this Court. The *supersedeas* provided for does not bring up to the Appellate Court the cause, or any part of it, for immediate revision. It will not operate as an appeal or writ of error. *Blake v. Dodge*, 8 Lea, 464; 7 Cold., 217. The object of the statute was to enable this Court, or one of its judges, to stay the execution of an order or decree of the Chancery Court which, in advance of the final hearing, undertakes to deprive the litigant of money or property. *Redmond v. Redmond*, 9 Bax., 561.

We are all of opinion that the decretal order of sale in this case is not such a decree as comes within the statute, and that this Court will not by writ of *supersedeas* supervise the discretion conferred upon the Chancellor in respect to the preservation of property *pendente lite*. The order complained of does not deprive the Memphis Appeal Company of its property in advance of the final hearing, for the reason that its property was a trust-fund, to be ratably distributed among its creditors.

The effect of the decree of the Court adjudging this company an insolvent corporation, was to sequester its property, and it thereby became appropriated in equity to the creditors. Moreover, the decree sought to be superseded simply executes

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that clause of the trust-deed made by defendant, Memphis Appeal Company, to complainants, A. D. Gwynne and R. J. Morgan, empowering them to sell this newspaper after six months. The decree was rendered more than six months thereafter. Nor do we think that this decretal order deprived Mrs. Collier of her property. Her indebtedness is in nowise affected or prejudiced by converting the corporate assets into money. The proceeds of the sale will be impressed with the same liens as the property sold, and the priorities can be determined after as well as before the sale. We are of opinion, in view of the very precarious situation of this property, it was eminently proper that it should be sold before it might be entirely lost to the creditors. It appears that the corporation is hopelessly insolvent, and that the income, earnings, and profits of the newspaper are far less than the expenses incurred for its maintenance and operation. It appears that, since the execution of the trust-deed to Morgan and Gwynne, on September 20, 1893, it has cost more than \$12,000 in excess of the earnings to run it. The report of the receiver shows that it has cost \$1,000 above the earnings of the paper to run since April 6, 1894, when this order of sale was made.

The indebtedness of W. J. Chase, receiver, on current business, to and including May 31, 1894, was \$5,991.54, of which amount \$3,143.68 was an overdraft. It appears that, at one time, the banks refusing to make further advances on receiver's

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certificates, and the income of the paper failing to pay current expenses, the receiver, Chase, reported the facts to the Court, and tendered his resignation. Two motions for a sale of the paper were made and overruled.

In the meantime, the deficit between income and expenses were steadily increasing, and the paper was kept up and issued upon the personal credit of the receiver. The Court finally accepted the resignation of Mr. Chase as receiver, and, at the instance of the defendants, appointed Mr. Hatchitt. Hatchitt made an examination of the books, and, being of opinion he could not improve on Chase's management, failed to qualify. The Court was thus constrained to refuse to accept the resignation of Mr. Chase, to which he excepted.

On the final motion for a sale, a large volume of testimony was taken, tending to show that the inevitable result of appointing a receiver for a newspaper lowered its prestige, decreased its value in every possible way, and that it was but a question of time when its entire value would be destroyed unless a sale was had. The Court seemed reluctant to order a sale over the objection of the company, and gave them ten days within which to name a receiver to succeed Chase, who would be able to keep the paper going. The company could not find a man to succeed Chase, it being perfectly apparent that the paper could not be kept going unless the receiver would advance his own money. The Court thereupon, on April 6, 1894, ordered a sale of the property. It appears

that the paper now stands in peril of sudden suspension, and, should one issue fail to appear, it is probable that the good will of the paper would be entirely destroyed.

The fact appears that, on last Friday, June 1, 1894, the sale by order of the Chancellor and United States Judge Hammond was postponed from June 4 to June 16, and, in order to supply funds to continue the publication of the paper up to June 16, the attorneys making the motion advanced to the receiver the sum of seven hundred (\$700) dollars from their own means; otherwise, it is claimed, the paper would have suspended.

It is obvious that this property is in a most critical and perilous condition, and that this Court ought not to interfere with the order of sale. It is manifestly to the interest of all parties that the order of sale should be executed. While the general principle is settled, both in this country and in England, that a receiver may be appointed to manage and conduct the publication of a newspaper, we approve the language of Chancellor Walworth "that a Court will not take upon itself the responsibility of continuing the publication of a political paper by a receiver any longer than is absolutely necessary to prevent a sacrifice of the property." *Martin v. Van Schaick*, 4 Paige, 480. See also *Dayton v. Wilkes*, 17 How. Pr., 510; *Kelly v. Hutton*, 17 W. R., 425; Beach on Receivers, bottom page 227.

The *supersedeas* is refused, and the petition dismissed.

Gas-light Co. v. Memphis.

GAS-LIGHT CO. v. MEMPHIS.

(Jackson. December 31, 1894.)

1. MUNICIPAL CORPORATIONS. *Statute of limitations.*

A municipal corporation that levies and collects a specific tax for the purchase of gas to light its streets, which tax, under the city charter, cannot be lawfully diverted to any other purpose, bears the relation of express trustee to a party who, under a valid contract, has furnished gas to the city, agreeing to receive the proceeds of said tax in payment; and no statute of limitation can bar the right of such party to recover of the city the proceeds of said tax. (*Post*, pp. 615, 616.)

2. SAME. *Implied contract.*

A municipal corporation, restricted by its charter to contract in writing, and to create no general liability, is nevertheless liable, upon an implied contract, to compensate a party who has furnished gas for use upon its streets, when a specific tax has been levied and collected for that purpose, which cannot be lawfully diverted to any other. (*Post*, pp. 616-618.)

3. INTEREST. *Not allowed.*

Interest is not allowed, in this case, upon the recovery of the gas-light company against the city, although the debt had been due, and the tax which had been levied for its payment had been collected, for several years. (*Post*, p. 618.)

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
W. M. SMITH, Sp. Ch.

J. R. FLIPPIN for Gas-light Co.

METCALF & WALKER for Memphis.

Gas-light Co. v. Memphis.

McALISTER, J. This bill was filed in the Chancery Court of Shelby County, by the Memphis Gas-light Company, to recover balance due for illuminating gas furnished the city of Memphis. The bill alleges that the gas was furnished to and consumed by the city during the years 1879, 1880, 1881, 1882, 1883, and 1884. The gas was originally furnished by the company under a written contract, executed by the parties in 1879, under the terms of which the gas company was to be paid ten cents on the \$100, the tax levied for lighting purposes, whenever said taxes were collected. It appears that, under the restrictions of the charter of the city of Memphis, the city is prohibited from creating any general liability to any creditor, but every creditor who makes a contract with the city is required to look alone to the particular tax levied for the purpose contemplated by the contract. The complainant was, therefore, restricted to the particular fund levied for lighting purposes.

This explanation is necessary in order to an intelligent understanding of the contract entered into between the parties. That contract is as follows: "That, for and in consideration of the payment by the city to the gas company of the whole tax, to wit: Ten cents on the \$100 levied by the Act establishing the Taxing District, for the lighting of the streets, etc., with gas, the gas company hereby covenants and agrees to furnish the city gas for five hundred and seventy lamps, etc. It is further understood and agreed that the gas company shall

look alone for payment to the fund derived or to be derived from the ten cents on the \$100 levied by the Act establishing this district for lighting streets and public buildings, as the same is levied and collected for and during the year 1879, and none other, and it is expressly understood that this contract is not to create, and does not create, any general liability on the city, but only against the aforesaid fund, and in the manner aforesaid." The contracts for 1880 and 1881 were also in writing, embodying substantially the same stipulations. The contracts for 1882, 1883, and 1884, if in writing, were not found, but the gas was furnished for these years according to bids, and upon the same terms as the former years.

It appears from the record that the city continued to pay on these contracts down to April, 1885, since which time it has paid nothing. The object of this suit is to recover taxes levied and collected by the city for gas purposes during the years of 1879 to 1884, inclusive, and which several amounts the city has failed to pay over. The sum of those taxes collected by the city since April, 1885, date of the last payment to the gas company, is alleged to be \$9,471.17. The Chancellor, the Hon. W. M. Smith, sitting in the place of the regular Chancellor, who was incompetent, pronounced a decree in favor of complainant for said sum of \$9,471.17, but the Court disallowed any interest on said debt. Complainant appealed, and its assignment is that the Chancellor erred in disallowing

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interest upon the debt found to be due when the bill was filed, and interest upon the several items making up the debt. .

The city of Memphis brought the case to this Court by writ of error, and has filed assignments of error. We will first dispose of the errors assigned on behalf of the city. The first assignment is that complainant is barred by the statute of limitation in respect to all sums collected more than six years before the filing of the bill herein. Of the aggregate amount thus collected, and for which the decree was rendered by the Chancellor, it appears that \$2,326.69 was collected more than six years before suit commenced. The Chancellor was of opinion that the fund arising from the collection of taxes levied for this specific purpose was a trust-fund, and that the statute of limitation, therefore did not apply. It is insisted by counsel for the city that the relation between complainant and the city was strictly that of creditor and debtor, and not that of trustee and *cestui que trust*. As already stated, the charter of the Taxing District levied an annual tax of ten cents on the one hundred dollars for lighting streets and public buildings. The charter further provided that said taxes should be collected by the County Trustee, and by him kept separate, and paid out by him for the purposes specified, upon joint warrants of two of said Commissioners. In no case shall the fund collected for one purpose be used for any other, etc. Section 11 provides, viz.:

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"That the diversion of any portion of any of said taxes or wharfage dues, or other funds, from the purposes for which they were levied, by any of the Commissioners or by the Trustee, shall be a felony, for which the guilty party, upon conviction, shall suffer imprisonment," etc.

It will be observed that this tax was levied for a specific purpose—to wit, the lighting of the streets—and, in pursuance of lawful contracts made by the city, the gas company became the equitable owner of those taxes. The Commissioners of the Taxing District are charged by the charter with the duty of disbursing those taxes for the purposes for which they were levied, and any diversion of those funds to other purposes than those for which they were levied is declared to be a felony. We are, therefore, of opinion that, in view of the provisions of this charter, the Commissioners are made express trustees of those taxes. The Board of Commissioners constitute an agency or instrumentality of the Taxing District, and the plea of the statute of limitations is unavailing as a defense to the city. We are, therefore, of opinion that the said sum of \$2,326.99, collected prior to the tenth of June, 1886, is not barred by the statute of limitations.

The next assignment is, viz.:

"The Court below erred in holding that there was any contract upon which complainant could in any event recover, except for the years 1879 and 1880. It is conceded for complainant that there

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was no formal or written contract between the complainant and defendant for any year, except the two last mentioned ones; and we submit (1) that there can be no recovery at all upon such a state of facts, and (2) that, if a recovery were possible, it must be on the basis of a *quantum meruit*, and that the complainant has wholly failed to make out its claim on that basis."

The charter of the city then in force provided that all contracts of every description shall be in writing, and shall be signed by all the commissioners assenting thereto, and shall be recorded in full in a well-bound book, open at all times for public inspection.

It is insisted, however, on behalf of complainants, that if it be conceded that these contracts, to the extent they were not in writing, were within the prohibition of the city charter, the city is still liable, on the doctrine of implied contract and upon a *quantum meruit*. The record shows that, for these years, the company furnished the gas which was consumed by the city, and that a tax was collected for its payment, but the same was diverted to other municipal purposes. The question, then, is whether the city, in view of the provisions of its charter, is liable upon an implied contract or *quantum meruit* for the gas thus consumed.

"The doctrine of implied liability," says Mr. Justice Fields, "applies to cases where money or other property is received under such circumstances that the general law, independent of express con-

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tract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain money of another by mistake or without authority of law, it is her duty to refund it, not from any contract entered into by her on the subject, but from general obligation to do justice, which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it, or, if used by her, to render an equivalent to the true owner, from the like general obligation. The law, which always intends justice, implies a promise." Dillon on Municipal Corporations, Sec. 460.

In the case of *Gas Company v. San Francisco*, 9 Cal., 453, it was held that "a city is liable for gas furnished it, with knowledge of the council, though no ordinance or resolution was passed authorizing it to be furnished."

Says Mr. Morawetz, viz.: "But municipalities, as well as private corporations, must account for money or other property applied by their officers to authorized uses, although the money or property so applied was received under an agreement which was wholly void." *Hitchcock v. Galveston*, 96 U. S., 350, 351.

We are therefore of opinion that complainants are entitled to recover for the gas furnished, upon an implied contract or upon a *quantum valebat*. There was no error in the decree of the Court disallowing interest on complainants' recovery. Questions of fact and other assignments were disposed of orally.

The decree of the Chancellor is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1894.

WILLIAMS *v.* DENTAL EXAMINERS.

(*Knoxville.* September 13, 1894.)

I. DENTISTRY. *Powers of State Board of Examiners.*

Under Act of 1891, regulating the practice of dentistry in this State, the State Board of Examiners therein created has power to refuse an application for license to practice dentistry based solely upon the diploma of a dental college, if the board shall deem that the college is not reputable; and the decision of the board in this regard cannot be coerced or reversed by the Courts, in the absence of arbitrary and oppressive conduct on the part of the board.

Act construed: Acts 1891, Ch. 108.

Cases cited and approved: Turnpike Co. *v.* Marshall, 2 Bax., 122;
Whiteside *v.* Stuart, 91 Tenn., 710; 5 Col., 60; 83 Mo., 123; 15 S.

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W. Rep., 322; 32 Minn., 324; 110 Ill., 180; 20 N. W. Rep., 238; 51 N. W. Rep., 283; 18 N. W. Rep., 85; 28 N. E. Rep., 178; 17 How., 235.

2. SAME. *Same.*

The Court finds no evidence in this record of arbitrary or oppressive conduct on the part of the Board.

FROM HAMILTON.

Appeal in error from Circuit Court of Hamilton County. · JOHN A. MOON, J.

INGERSOLL & PEYTON for Williams.

CLARK & BROWN for Dental Examiners.

WILKES, J. The relator, M. B. Williams, filed his petition in the Circuit Court of Hamilton County against the State Board of Dental Examiners, seeking to compel that board to issue to him a certificate or license to practice dentistry in the State of Tennessee.

In his petition he alleges that he has a valid diploma from the Tennessee Medical College for the practice of dentistry; that said college, located at Knoxville, Tennessee, is a reputable college, duly chartered and organized under the laws of the State, and authorized to confer diplomas; that in it is annually delivered a full course of lectures and instructions in dentistry and dental surgery;

that he presented said diploma, together with five dollars, the lawful fee, to the defendant board, and asked them to file and register the same, and to issue to him a certificate to practice dentistry in Tennessee; that said board refused to issue such certificate and license on said diploma, unless petitioner would submit to an examination satisfactory to the board; that such refusal was unwarranted, arbitrary, and unlawful.

To this petition a demurrer was filed, setting out that the functions of the board in passing upon applications for license are judicial and discretionary in the board, and its action upon the application was final and conclusive, and that the Courts have no jurisdiction to compel the board to issue such certificate or license; that petitioner's demand was purely of a private nature, relating to no particular public duty, function, or office, and therefore the writ would not lie; and that petitioner refused to submit to an examination by the board, and therefore shows no right in himself, and no proper demand, and is hence entitled to no relief.

The demurrer was overruled, and thereupon defendant answered:

First.—That the Tennessee Medical College, which issued the diploma, is not a reputable college of dentistry.

Second.—That at the time of the issuance of the diploma there was not annually delivered a full course of lectures and instructions in dentistry and dental surgery; that the board was not by law

compelled to recognize its diplomas as valid and sufficient to warrant the issuance of license; that the board was vested with judicial discretion in the discharge of its duties, for the protection of the public against incompetency and in order to keep the practice of dentistry in the State up to a reasonably high standard, and that it cannot be controlled and coerced in the exercise of this judicial discretion; that the license was refused because the board did not consider the college which granted the diploma as a reputable college, and their determination of this matter is final and conclusive, and mandamus could not lie.

Much proof was taken on the part of the board to show the ground and reason for its action, and why it did not regard the college as reputable, and by the petitioner to show that the course of instruction in the college was unusually thorough, and its faculty composed of intelligent and competent instructors, and its diplomas entitled to be respected and recognized as valid.

It appeared from the record that the State Board has determined to recognize as reputable such schools of dentistry as belonged to the "National Association of Dental College Faculties," and *all others* that delivered two full courses of "dental lectures," and furnished sufficient proof of their regularity; that all students not holding a diploma from some literary college, university, or high school, or a teacher's certificate of proficiency, should be required to pass a satisfactory preliminary

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examination before being allowed to matriculate, and that a three years' course of study be required for graduation.

It further appears that when the relator presented his diploma, and asked to be licensed, the board refused to recognize the diploma, but offered to make an examination, and, if satisfactory, to grant him a certificate, and notice to this effect was given to the relator, and also to the college of which he was a graduate.

It further appeared that the association called the "American Association of Dental Faculties" was composed of representatives from the various dental colleges in the United States, and was organized for the purpose of perfecting a uniform system of dental instruction, looking to the establishment of a uniform graded course and dental education that would be entitled to recognition in the several States, and to provide a uniform curriculum of studies in dental schools, and the higher advancement of the dental profession.

It appears that the State Board adopted the rules of this Association, and were to a great degree governed by its recommendations, but were not bound absolutely by it, but could, in their discretion, require more or less than the Association required, and that other State Boards of Dental Examiners, so far as could be ascertained, were members of this Association.

It does not appear that there was any prejudice or ill will on the part of the State Board toward

the Tennessee Medical College, or that it required more of students or graduates of this college than of others, and it does appear that the Tennessee Medical College had, subsequent to the issuance of the diploma to the relator, changed their course of instruction so as to conform more nearly to that recommended by the National Association and prescribed by the State Board. It had also applied to become a member of the National Association.

On the hearing of the case, the Circuit Judge excluded all evidence introduced by the relator to show that the Tennessee Medical College was a college in good repute, and held that the action of the State Board upon this question was conclusive, and dismissed the petition, from which judgment petitioner appealed, and has assigned errors, which raise the main question as to the power and functions of the State Board, and whether their action is final and conclusive as to the issuance of license.

The State Board of Dental Examiners was created by the Act of 1891, Chapter 108. So much of that Act as is material for the purposes of this case is as follows:

"SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee,* That it shall be unlawful for any person to practice, or attempt to practice, dentistry or dental surgery in the State of Tennessee without first having received a diploma from the faculty of some reputable dental college, school, or university department duly authorized by

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the laws of this State, or some other of the United States, and in which college, school, or university department there was, at the time of the issuance of such diploma, annually delivered a full course of lectures and instructions in dentistry or dental surgery; *Provided*, That nothing in Section 1 of this Act shall apply to any person engaged in the practice of dentistry or dental surgery in this State at the time of the passage of this Act, except as hereinafter provided; *And provided further*, That nothing in this Act shall be so construed as to prevent physicians, surgeons, or others from extracting teeth.

"SEC. 2. *Be it further enacted*, That a Board of Examiners, consisting of six practicing dentists of acknowledged ability as such, two of whom shall be residents in each of the three subdivisions of the State—East, Middle, and West Tennessee—is hereby created, who shall have authority to issue certificates to persons in the practice of dentistry or dental surgery in the State at the time of the passage of this Act, and also to decide upon the validity of such diplomas as may be subsequently presented for registration, as hereinafter provided, and issue certificates to all applicants who may hereafter apply to said board and pass a satisfactory examination.

"SEC. 6. *Be it further enacted*, That any person desiring to commence the practice of dentistry or dental surgery within this State, after the passage of this Act, shall, before commencing such practice,

file for record in a book kept for such purpose with said Board of Examiners his or her diploma, or a duly authenticated copy thereof, the validity of which said board will have power to determine. If accepted, said board shall issue to the person holding such diploma a certificate duly signed by all or a majority of the members of said board, and which certificate shall entitle the person to whom it is issued to all the rights and privileges set forth in Section 1 of this Act; *Provided*, That any person, whether holding a diploma as aforesaid or not, shall have the privilege of making application to said board, and, upon undergoing a satisfactory examination, shall be entitled to a certificate in like manner as a person holding a diploma, and upon the same terms."

It is insisted upon the part of the board that the power and duty is devolved upon it by the terms of this Act to determine both as to the genuineness of any diploma offered to it and as to the force and effect of such diploma—that is, it must pass not only upon the question whether the diploma is a genuine document and not a forgery, but also whether it is issued by a reputable college, and that its determination of these questions is final and conclusive, and its action thereon cannot be controlled by the Courts unless it appear that it has acted arbitrarily and from prejudice, so as to unjustly deprive the applicant of his legal rights, and that such power is necessary to the proper execution and administration of the law.

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The purpose of this Act, as shown by its caption, is "to regulate the practice of dentistry in Tennessee, and punish violators thereof."

The first section of the Act prohibits the practice of dentistry in the State except by persons bringing themselves into certain conditions, one of which is that the applicant may receive such license if he hold a diploma from some reputable dental college, etc.

By the next section a State Board of Examiners is created, and their duties defined, among which is the issuance of certificates for license, and they are authorized to decide upon the validity of such diplomas as may be presented to obtain certificates, and also to make examinations when no diplomas are presented; and in the sixth section it is provided that any person undergoing a satisfactory examination, whether holding a diploma or not, shall be entitled to a certificate.

Much has been said as to the scope and meaning of the word "validity" as applied to a diploma, and whether it means simply its genuineness, or, in addition, its force and effect as emanating from a reputable college.

It is evident, from the purpose and tenor of the Act, that it was intended that an applicant, basing his claim upon a diploma from a dental college, and relying upon that, and declining to pass an examination, must have a diploma from a reputable dental college. It is also evident that, in order to give force and effect to the Act, the board of examiners provided for in it must have

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discretion and power to determine, in cases of applicants with diplomas, whether they come within the provisions of the law, and whether the diplomas tendered by them as the basis of their application emanate from a reputable dental college. Otherwise, a diploma issued by a college without any standing or reputation, and having an existence merely in name, would be as sufficient and satisfactory as if it came from the best college in the land. There must be the power to determine this question lodged somewhere, and it is evident that it was the purpose of the Legislature to lodge it in the board of examiners created by the Act. It could not be lodged in a more appropriate tribunal, composed, we must presume, of men learned and trained in their profession, and competent to pass upon not only the qualifications of applicants, but on the reputation of schools within their State engaged in dental education.

In performing their duties, the board is exercising a *quasi* judicial function, and, so long as it does not act arbitrarily and illegally, its determination cannot be coerced by the Courts through writs of mandamus, so far as they involve the exercise of their discretion. *State v. Gregory et al.*, 83 Mo., 123; *Hathaway v. The State*, 15 S. W. Rep., 322; *State, etc., v. The Board*, 32 Minn., 324; *People v. The Examiners*, 110 Ill., 180; *Powell v. The State Board*, 20 N. W. Rep., 238; *McLaughlin et al. v. Bowen*, 51 N. W. Rep., 283; *State v. Kendall*, 18 N. W. Rep., 85; *State v. Cristis*, 28

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N. E. Rep., 178; *United States v. Seaman*, 17 How., 235; *White's Creek Turnpike Co. v. Marshall*, 2 Bax., 122, 123; *Whiteside v. Stewart*, 91 Tenn., 710; *Williams v. Camden*, 5 Col., 60.

We have not been able to find in the record that the defendant State Board has been guilty of arbitrarily and oppressively exercising their duties and functions, and it has, by rules which seem to us to be altogether proper, fixed a standard by which to determine the standing of dental colleges, and, in so doing, has been guided by the opinions and rules of a national association, composed of eminent dental men, selected in several different States with a view to promoting uniformity of decision and advancing of the profession; and having by these rules tested the diploma presented to them and determined that it did not emanate from a dental college which, at the date of its issuance, had brought itself up to the standard, although it may have subsequently done so, we are of opinion their finding is warranted by the law and conclusive on the facts, and not subject to be controlled by writs of mandamus from the Courts.

The adoption of the rules of the national association is in no sense a surrender of the board's power or discretion, but, on the contrary, so far as we can see, an effort to conform to a system recognized over the United States as conducive to the advancement of dental science and promoting the best interest of the profession.

The judgment of the Court below is affirmed, with costs, and the petition is dismissed.

 Rogers v. Betterton & Co.

ROGERS v. BETTERTON & Co.

(Knoxville. September 25, 1894.)

1. CHANCERY PRACTICE. *Waiver of demurrer.*

A demurrer separately filed, and overruled upon argument, with leave to rely upon it in the answer, is waived, though set up in the answer, unless it is again called up and disposed of before the cause is heard upon its merits. (*Post*, pp. 632, 633.)

Cases cited and approved: *Boyd v. Sims*, 87 Tenn., 774; *Stephens v. Martin*, 85 Tenn., 278; *Kyle v. Riley*, 11 Heis., 230; *Caruthers v. Caruthers*, 2 Lea, 77; *Hardin v. Eagin*, 2 Tenn. Ch., 39.

2. PARTNERSHIP. *Partner's powers.*

A partner cannot, without the assent of his co-partners, apply firm assets to the payment of his individual debts. And the creditor of a single partner, knowingly receiving firm assets in payment of his debt, must account to the firm for its assets thus misappropriated. (*Post*, pp. 633-638.)

Cases cited and approved: *Foundry Co. v. Wisdom*, 4 Lea, 699; *Atkin v. Berry*, 1 Lea, 91; 7 Wend., 326; 4 Johns., 251; 75 Va., 534; 94 Pa. St., 31-36; 33 La. Ann., 1455; 74 Mo., 138; 49 Miss., 761; 28 Ohio St., 55, 60; 46 Ill., 211; 54 N. H., 414; 18 Conn., 294; 15 Ala., 273; 10 Iredell, 89; 6 Jones, 44; 49 Ind., 530; 27 Minn., 390; 46 Ill., 211; 16 Johns., 34; 36 Wis., 131; 46 Conn., 592; 56 Mo., 558-562; 124 Ill., 474.

 FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County. T. M. McCONNELL, Ch.

CLIFT & CANTRELL and EAKIN & DICKEY for Rogers.

Rogers v. Betterton & Co.

ROBT. P. WOODARD for Betterton & Co.

WILKES, J. Betterton & Co. recovered judgment against Skipper & Rogers, as partners, before a Justice of the Peace, for \$167 and costs, on February 9, 1892. No defense was made by the defendants before the Justice of the Peace, and execution was stayed by them.

A few days thereafter, Rogers ascertained that two checks had been given to Betterton & Co., one for \$50 and one for \$40, for which the firm had received no credit. Afterwards, and before the expiration of the stay, on August 29, 1892, Rogers, alone, filed this injunction bill, stating that, at the time the judgment was rendered, he did not know these checks had ever been given by the firm of Skipper & Rogers to Betterton & Co., and, hence, did not ask for a credit for the same on the trial before the Justice of the Peace; that he had since ascertained the fact, and asked that he be allowed credit for them, and that the judgment, to the extent of the two checks, be enjoined, and for general relief. The bill states that Skipper, his co-partner, had become insolvent, and that that there were no funds of the firm of Skipper & Rogers out of which to re-imburse himself in case of payment by him; that Skipper had run the business, and that he (Rogers) did not know the firm was indebted to Betterton & Co. until they were sued before the Justice of the Peace. An injunction issued as asked.

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Defendants, Betterton & Co., demurred to the bill on several grounds: (1) Because complainant's remedy, if he had any, was *certiorari* and *superseas* in the Circuit Court to correct error in the Justice's judgment. (2) The bill did not allege any fraud or wrong in the disposition of the two checks. (3) That complainant had been negligent in making his defense. (4) The bill did not show that the proceeds of the checks had been illegally or improperly applied. (5) Complainant's remedy is by a separate action to recover the amount of the two checks if they have been improperly applied and no proper credit given. (6) That while the injunction is against only a portion of the judgment of the Justice of the Peace, its necessary effect is to tie up the entire judgment, and prevent the collection of that portion which is not disputed.

This demurrer was set down for hearing, and, after argument, was overruled by the Court, but leave given defendants to rely on the same in their answer.

The answer filed states, in general terms, that defendants rely and insist on their demurrer heretofore filed in this cause, but it was not again called up for final action by the Court previous to the hearing. It has been repeatedly held that matters of demurrer must be set down for argument and disposed of before the hearing, or they will be treated as abandoned. *Caruthers v. Caruthers*, 2 Lea, 77; *Kyle v. Riley*, 11 Heis., 280; *Stephens v. Martin*, 1 Pickle, 278.

And when leave has been given to rely on a demurrer in the answer, the advantage of it will be lost, and the demurrer treated as waived, unless it is disposed of before the cause is heard upon its merits. *Boyd v. Sims*, 3 Pickle, 774. See also *Hardin v. Eagin*, 2 Tenn. Ch., 39.

And this rule holds good as well when there has been a preliminary hearing of the demurrer, and the same is overruled with leave to rely on it in the answer, as when it is incorporated in the answer without being separately filed. Whatever defects there may be in complainants' bill, raised by the demurrer filed, must be therefore considered as waived, because of the failure to have the matters of demurrer finally disposed of before the hearing upon the merits.

Coming, then, to the merits of the case, the record discloses that, prior to September 14, 1891, Skipper, of the firm of Skipper & Rogers, had been in business, and dealing with Betterton & Co., and had become indebted to them, on his individual account, in the sum of about \$175. He had recently entered into partnership with Rogers, and was the active member of that firm, though Rogers furnished most of the money.

On September 14, 1891, Skipper went to the business house of Betterton & Co., and delivered to Cox, their book-keeper and salesman, the check for \$50 referred to. At the same time he bought a bill of goods, amounting to \$69.80, for the firm of Skipper & Rogers. These two persons wholly

disagree as to what was said about the application of the check, Skipper insisting that he directed it to be applied, so far as it would go, on the bill of goods that day bought by Skipper for Skipper & Rogers, while Cox insists that Skipper directed the check to be applied to his separate antecedent account, and that he afterwards sold him the bill for Skipper & Rogers on sixty days' time. Afterwards the second check, for \$40, was sent, and the like controversy arises in regard to it, Skipper insisting that it was directed to be placed to credit of Skipper & Rogers on their account, and Cox that Skipper's directions were to apply it, also, to his old account, and that, although Skipper & Rogers had bought other bills in the meantime, all of them were on a credit, and none of them were due when the checks were received.

It clearly appears that Cox knew that the checks were drawn against the funds of Skipper & Rogers. They were signed in the name of the firm, and Cox says he noticed this fact at the time, and asked Skipper if Rogers had become a partner, and was told he had, and, for that reason, he was anxious to sell him the bill of goods for the new firm on a credit. It clearly appears from the record, that Rogers, the other partner, did not know of the giving of these checks, nor of the application of their proceeds to Skipper's antecedent debts to Betterton & Co. While it appears clearly that Skipper was the active manager of the firm of Skipper & Rogers, and, as such, must be

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presumed to have authority to draw checks for the firm, yet they could only be drawn for firm account, and their proceeds applied to firm purposes, and neither Skipper nor Cox had any authority to apply them to the antecedent debts of Skipper, unless the consent of Rogers was obtained thereto, or he afterwards assented to such appropriation. The law upon this question is well settled.

In the leading case of *Rogers & Sons v. Bachelor et als.*, it was held by the Supreme Court of the United States that one partner cannot apply the funds of the partnership to the discharge of his own separate pre-existing debts without the express or implied assent of the other partners, and it makes no difference, in such case, that the creditor did not at the time know that the fund was partnership property. 12 Peters, 221. See also *Dobs v. Halsey*, 16 Johns., 34.

The general rule is, that one partner may not use the firm assets in payment of his individual debts, but if the co-partner expressly or impliedly assent thereto, or afterwards ratify the act, the payment will be held good. *Everyhire v. Ensworth*, 7 Wend., 326; *Livingston v. Roosevelt*, 4 Johns., 251; *Liberty Savings Bank v. Campbell*, 75 Va., 534; *Hartley v. White*, 94 Pa. St., 31-36; *Allen v. Cary*, 33 La. Ann., 1455; *Forney v. Adams*, 74 Mo., 138; *Sligall v. Coney*, 49 Miss., 761; *Thomas v. Punich*, 28 Ohio St., 55, 60; *McNair v. Platt*, 46 Ill., 211; *Caldwell v. Scott*, 54 N. H., 414; *Filley v. Phelps*, 18 Conn., 294; *Burnwell v.*

Springfield, 15 Ala., 273; *Norment v. Johnson*, 10 Iredell, 89; *Carter v. Beaman*, 6 Jones, 44; *Conant v. Fray*, 49 Ind., 530. See also *Atkin v. Berry*, 1 Lea, 91.

The rule as laid down in *Parsons on Partnership*, Sec. 135 (4th Ed.), is substantially as follows: He who knows that the partner's act is not within the firm's business, knows it is not authorized, and when he sees that the partner is acting for his individual and separate benefit, he cannot *presume* that it is authorized by the firm. See also *Parsons on Partnership*, Secs. 90 and 91.

A large class of cases hold that, when the creditor has knowledge of the fact, expressly or impliedly, the burden is upon him to show that the partner had authority to use the firm's property to pay his private debts. *Davis v. Smith*, 27 Minn., 390; *McNair v. Platt*, 46 Ill., 211. And the mere fact that the partner states that he has consent of his co-partner is not sufficient. *Allen v. Cary*, 3 La. Ann., 1455-1460.

The case of *Dobs v. Halsey*, 16 Johnson, 34, states the rule to be in England that the burden of proof is on the co-partner to show his dissent or want of knowledge, while, in the New York Courts, it is on the separate creditor to show the assent of the whole firm. In the same case it is held that money thus paid may be recovered back by the partnership. *Dobs v. Halsey*, 16 Johns., 34; 8 Am. Dec., 293, note 297. And this is supported by many cases. *Forney v. Adams*, 74 Mo.,

138; *Viles v. Bangs*, 36 Wis., 131; *Burnwell v. Springfield*, 15 Ala., 273; *Moriarity v. Bailey*, 46 Conn., 592.

Many of the cases go to the extent of holding that, though the separate creditor may not have known that the funds used were partnership funds, still the rule applies. 75 Va., 539; 54 N. H., 474. *Ackley v. Stocklin*, 56 Mo., 558-562; *Moriarity v. Bailey*, 46 Conn., 592. See *Davis v. Atkinson*, 124 Ill., 474; 7 Am. State Reports, note, 378-380. See also *St. Louis Type Foundry Co. v. Wisdom*, 4 Lea, 699.

In the case at bar we have one partner, without the knowledge of his co-partner, applying the firm's money to the payment of his antecedent debt. The creditor knew that the funds being used were those of the firm of Skipper & Rogers, and not of Skipper, and he could not apply such funds to Skipper's individual, antecedent debt, except by the assent of the co-partner, Rogers. The money thus paid was improperly diverted from the firm's purposes to the individual partner's purposes, and complainant is entitled to have credit for the same as against the debt held by the firm of Betterton & Co. against Skipper & Rogers, and, the demurrer being out of his way, may have such credits applied in this case, although after the judgment was rendered before the Justice of the Peace.

The decree of the Chancellor is reversed, and

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complainant will have credit for the amount of the two checks, and proper interest from the time they were paid to Betterton & Co. The costs of the cause in this Court and in the Court below will be paid by defendants, Betterton & Co.

Clark v. Jones.

CLARK v. JONES.

(Knoxville. September 25, 1894.)

1. BILLS AND NOTES. *Indorsement of carries mortgage security.*

The transfer by indorsement of a promissory note carries with it, without formal assignment, the benefit of a deed of trust upon land given to secure the note.

Cases cited and approved: *Graham v. McCampbell*, Meigs, 52; *Cleveland v. Martin*, 2 Head, 129; *Roberts v. Francis*, 2 Heis., 133; *McCallum v. Jobe*, 1 Leg. R., 244; *Anthony v. Smith*, 9 Hum., 511; *Thompson v. Pyland*, 3 Head, 539.

2. DEEDS OF TRUST. *Foreclosure bill.*

Bill to foreclose a trust-deed is maintainable, although no obstacle exists, or is averred, to prevent sale by the trustee.

Cases cited and approved: *Bennett v. Union Bank*, 5 Hum., 615; 56 Miss., 497.

3. SAME. *Same. Costs.*

But if foreclosure suit is needlessly resorted to, when sale by the trustee would have been equally effectual, the complainant will be taxed with the additional costs and expenses incident to his unnecessary suit.

4. SAME. *Same. Attorney's fees.*

And complainant's attorney's fees for the prosecution of such needless suit will not be allowed against the defendant, under a stipulation in the note sued on that the maker should pay reasonable attorney fees for collection of the note, if it should be "necessary to resort" to suit for that purpose.

5. CHANCERY SALE. *Terms of under mortgage or trust-deed.*

Sale cannot be decreed, barring the right of redemption, upon foreclosure of a deed of trust providing for cash sale with right of re-

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demption. The Court's decree must conform to the contract of the parties.

Cases cited and approved: Knox v. McCain, 13 Lea, 199; Frierson v. Blanton, 1 Bax., 272.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.
T. M. McCONNELL, Ch.

ELDER & PATTON for Clark.

N. H. BURT for Jones.

CALDWELL, J. This is a foreclosure bill. On July 27, 1891, A. G. Hickman sold and conveyed to R. L. Jones a tract of land in Hamilton County, taking his six-months' promissory note for \$250 as part of the consideration. The note recited on its face that it was given for a part of the purchase-price, and that its payment was secured by a deed of trust on the land. In pursuance of their agreement, Jones, on the same day, reconveyed the land to Hickman, as trustee, with full power of sale in case the note should not be paid at maturity. Thereafter Hickman sold and indorsed the note to W. I. Clark. Default having been made, Clark, as holder and owner of the note, filed this bill against Jones, as maker of the note and deed of trust, and against Hickman,

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as indorser and trustee, to foreclose the deed of trust under the decrees of the Court.

Jones demurred to the bill, (1) because it did not allege a transfer of the *deed of trust* by Hickman to Clark, and (2) because it did not allege that the trustee had refused to execute the trust, or that Jones had done any thing to prevent him from doing so.

The demurrer was overruled; and Jones filed an answer, denying, in many different forms, the right of complainant to have the deed of trust foreclosed by decree of Court, when the way for a sale by the trustee was entirely free and unobstructed.

Hickman, the trustee, answered, stating that he had ever been ready and willing to execute his power of sale, if the complainant should request him so to do.

Hearing the cause upon the whole record, the Chancellor granted the relief sought in the bill. The land was sold, and the sale confirmed. Defendant, Jones, has appealed.

First.—The first ground of demurrer was properly overruled. It was not necessary to Clark's enjoyment of the security provided for his note that it should have been formally transferred to him. The transfer of the note, without more, carried with it the lien created by the deed of trust. *Graham v. McCampbell*, Meigs, 52; *Cleveland v. Martin*, 2 Head, 129; *Roberts v. Francis*, 2 Heis., 133; *McCallum v. Jobe*, 1 Leg. R., 244; *Anthony v. Smith*, 9 Hum., 511; *Thompson v. Pyland*, 3 Head, 539.

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Second.—The second ground of demurrer was also properly overruled. It was not necessary to the relief sought that complainant should have alleged that the trustee had refused to execute the trust, or that his execution of it had been impeded by the maker, or any other person. The mere allegation of the valid existence of the note and deed of trust, and of complainant's ownership of the note, and that it was past due and unpaid, gave him a standing in Court.

The jurisdiction of Courts of Equity to foreclose mortgages is almost as old as the Courts themselves; formerly it was exclusive, because such instruments, then, conferred no power of sale upon any individual. Now, however, mortgages with power of sale, or deeds of trust, are very generally adopted as security for debt. These may be foreclosed by the person designated for that purpose; or, at the election of the mortgagee or beneficiary, by a Court of Equity. The introduction of the later mode of foreclosure does not supersede the former one, but is in addition to it; it is merely cumulative. *Bennett v. Union Bank*, 5 Hum., 615; *McDonald v. Vinson*, 56 Miss., 497; 2 Perry on Trusts, Sec. 602gg; 1 Jones on Mortgages, Sec. 1443; 8 Am. & Eng. Ency. of Law, 277, 278, and cases cited.

Third.—But, since mortgages with power of sale or deeds of trust are resorted to, because affording a *less expensive* as well as a more convenient and more expeditious mode of foreclosure than that

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formerly existing, the makers will not be required to pay the greater expense of a foreclosure in equity, unless some good and sufficient reason be shown for taking the matter into Court. No such reason is shown to have existed in this case, hence, the full costs should not have been adjudged against Jones. He was properly taxable with only so much expense as would have been incurred in a sale by the trustee.

Fourth.—It was also error to charge Jones with complainant's attorney's fee in this case. It is true that Jones agreed, in the face of his note, that he would pay a reasonable attorney's fee, "if necessary to resort" to suit for the collection of the note; but no such resort is shown to have been necessary. On the contrary, it appears that the note could have been collected without litigation. The mode of payment provided in the deed of trust was ample. The trustee had full power of sale, was ready and willing to sell, and could have sold easily, and without interruption, at any time.

Fifth.—The deed of trust provided for a sale for cash, with right of redemption in the maker. The Court, upon the application of complainant, ordered a sale on a credit of six and twelve months, barring the right of redemption. This was error. The terms of sale prescribed in the instrument creating the lien were controlling. See *Knox v. McCain*, 13 Lea, 199, overruling *Frierson v. Blanton*, 1 Bax., 272.

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Sixth.—Reverse, and direct sale for cash, with right of redemption. Complainant will pay all costs up to this time, and Jones will pay costs of sale hereafter made, upon the ground that the latter will be about the same as if sale had been made by trustee.

LOOKOUT BANK v. AULL.

(Knoxville. October 2, 1894.)

1. BILLS AND NOTES. *Rights of bona fide holder.*

The *bona fide* holder of a negotiable note, who acquired it in due course of trade, for value, before its maturity, and without notice of any condition affecting its delivery, can enforce it against a surety who signed and placed it in the hands of the principal, perfect upon its face, upon an express collateral agreement, which was never complied with or waived, that it should not be delivered to the payee until it had been signed by another designated person.

Cases cited and approved: *Merritt v. Duncan*, 7 Heis., 156; *Jordan v. Jordan*, 10 Lea, 124; *Perry v. Patterson*, 5 Hum., 132.

2. SAME. *Same. Note payable to bank cashier.*

A note discounted for a bank, with its funds, but made payable to its cashier, is the property of the bank, upon which it can, without the cashier's indorsement, maintain suit in its own name with the same advantages as if the note had been made payable to the bank.

Cases cited and disapproved: 20 Vt., 666; 4 Dev. & B., 274.

3. SAME. *Same. Payee protected as bona fide holder.*

The payee of a note will be protected as a *bona fide* holder to the same extent and under like conditions as an indorsee.

Case cited and approved: *Jordan v. Jordan*, 10 Lea, 134.

4. SAME. *Same. Taken for pre-existing debt.*

A note is not given for a pre-existing debt in such sense as to let in defenses against a *bona fide* holder who acquired it before maturity, where it is accepted in renewal and satisfaction of an older note with different sureties.

Lookout Bank v. Aull.

Cases cited and approved: Nichol v. Bate, 10 Ver., 429; Cherry v. Frost, 7 Lea, 1; Jordan v. Jordan, 10 Lea, 134.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.
T. M. McCONNELL, Ch.

J. A. CALDWELL for Bank.

CLIFT & CANTRELL for Aull.

BEARD, J. The bill in this cause was filed, seeking a decree against Aull and Clift, who were sureties of one O'Brien on a note of \$3,000, payable six months after date to the order of "J. O. Rice, Cashier." The defendants resist recovery upon the ground that this note was signed by them as sureties upon the distinct agreement with their principal, O'Brien, that he would not deliver it to the payee until he had one Baskett to sign it as co-surety with them, and that, in disregard of this agreement, and without their knowledge or consent, it was turned over to the payee, who accepted it in payment of a pre-existing debt. These defenses are made out by the evidence in the record. At the same time, it affirmatively appears that complainant accepted the note sued on without any notice of the facts thus relied on by de-

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fendants. A decree was pronounced against the sureties, and they have appealed.

The case rests on the question, Was complainant the *bona fide* holder of this note for value, before maturity, and in due course of trade? If so, then the decree of the Chancellor must be affirmed.

It is settled that a note, though negotiable in form, signed by a surety and placed in the hands of another party, upon condition that it is not to be delivered to the payee until some other person shall sign it, is an escrow, and, as to the original parties or the payee taking it with notice of such condition, remains an escrow, and, as such, is not enforceable against this surety. *Perry v. Patterson*, 5 Hum., 132.

It is equally well settled that such a note will become a valid and enforceable obligation of the surety imposing the condition when it passes from the party holding it in escrow into the hands of a *bona fide* holder for value, in due course of trade, and before maturity. *Merritt v. Duncan*, 7 Heis., 156; *Jordan v. Jordan*, 10 Lea, 124.

First.—It is insisted complainant is not such a holder, because the note is payable to "J. O. Rice, Cashier," and is not indorsed by him to complainant. While this is the condition of this note, yet the record shows the payee to have been the cashier of complainant bank at the time the note was taken, as well as when this suit was brought; that the bank's money was the consider-

ation for it, and that it was from the beginning the bank's property.

There are old cases holding, in such a case, the bank could not sue in its own name on such a note without an indorsement of it by the payee. *Bank of United States v. Lyman*, 20 Vt., 666; *Horah v. Long*, 4 Dev. & B., 274. But the authority of these cases has been overthrown, and the consensus of judicial opinion now is that such a note, executed under the conditions just stated, is, upon delivery, *ipso facto* the property of the bank, and can be sued upon without indorsement. 1 Randolph on Commercial Paper, Secs. 133, 157; 2 Daniel on Notes and Bills, Sec. 1189.

Second.—It is further insisted that, as the note sued on is the property of the payee, the rule protecting the title of a *bona fide* holder of negotiable paper does not apply, the argument being that the rule can only be invoked by some one holding after the instrument has passed from the payee to an indorsee for value. This contention, however, is unsound, as is held in *Jordan v. Jordan*, 10 Lea, 134.

Third.—Finally, it is urged the note was taken for a pre-existing debt.

The paper in question was a renewal, and was the last of a series of six-months' notes, for the same amount, covering a period of five years. According to the testimony of defendant, Aull, the note, of which the present is the renewal, was, upon the execution of this one, surrendered

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by the bank to O'Brien. On this surrendered note were the names of Clift, Baskett, and Albright as sureties. The present note has upon it the names of Clift and Aull as sureties. The present note extinguished the older one, thereby releasing Baskett and Albright. We hold that while the original consideration ran through the various renewal notes into the present one, yet the surrender and extinguishment of the older note, and the consequent release of Baskett and Albright, makes complainant the *bona fide* holder for value of this note now sued on. *Nichol v. Bate*, 10 Yerg., 428; *Cherry v. Frost*, 7 Lea, 1; *Jordan v. Jordan*, 10 Lea, 134.

The decree of the Chancellor is affirmed.

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DUN v. GARRETT.

(Knoxville. October 2, 1894.)

1. BONDS. *Delivery in escrow.*

Where an unofficial bond, regular in form and perfect on its face, has been delivered by the principal maker to the obligee, and accepted in good faith by the latter, as a complete instrument, without knowledge on his part of any fact calculated to excite suspicion or cause inquiry as to the manner of its execution and delivery, a surety thereon cannot successfully defend himself against liability that has already accrued by reason of the principal's breach of the bond, upon the ground that the bond had been delivered by the principal maker to the obligee in violation of a private agreement between the principal and surety, made at the time the latter signed the bond and placed it in the principal's hands, that it should not be delivered to the obligee until another person designated had signed it.

Cases cited: *Perry v. Patterson*, 5 Hum., 132; *Carrick v. French*, 7 Hum., 457; *Majors v. McNeilly*, 7 Heis., 294; *Breedin v. Grigg*, 8 Bax., 163; *Quarles v. Governor*, 10 Hum., 121; *Bryan v. Glass*, 2 Hum., 390; *Governor v. Organ*, 5 Hum., 161; *Ezell v. Justices*, 3 Head, 587; *Amis v. Marks*, 3 Lea, 573; *Jordan v. Jordan*, 10 Lea, 124; 2 Durn. & East, 21; 63 Mo., 212 (21 Am. Rep., 440); 1 Salkeld, 289; 23 Mich., 457; 27 Ind., 368; 32 Ind., 1; 53 Maine, 284; 2 Met. (Ky.), 608; 24 Grattan, 202; 16 Wall., 1; 4 Cranch, 219; 32 N. Y., 445; 56 N. Y., 67; 1 Southern Rep., 276; 6 Ga., 202.

2. SAME. *Same. Burden of proof.*

But it must affirmatively appear, in such case, that the obligee took the bond without notice of its conditional delivery by the surety to the principal maker.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.
T. M. McCONNELL, Ch.

Dun v. Garrett.

PRITCHARD & SIZER for Dun.

CLARK & BROWN for Garrett.

BEARD, J. A bond, unofficial in character, was executed by one Garrett as principal, and by these defendants as his sureties, payable to complainant as obligee. This bond, regular in its form and perfect on its face, was delivered by the principal obligor to the obligee, and was accepted by the latter in good faith, as a complete instrument, without any facts or circumstances attending its delivery to excite suspicion or cause inquiry on the obligee's part as to the mode of its execution. On these facts the question here presented for determination is this: After loss, covered by the terms of this bond, has occurred to the obligee, by the default of the principal obligor, can a surety avoid recovery for this loss upon the ground that he had made a private agreement with his principal, at the time of signing and leaving it in the latter's hands, that the principal obligor should not deliver it to the obligee until another party had signed it as surety, when, in violation of this agreement, and without the knowledge or consent of the surety, the bond was subsequently delivered?

The Court below held he could; that the bond so delivered was void as to the surety, and the bill was, therefore, dismissed. From this decree the complainant has appealed.

The subject here presented has provoked much discussion, which resulted in some conflict of au-

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thority. It will be necessary, in order to arrive at a correct conclusion in this cause, to examine with some care not only the cases in our own State in which this question has arisen, but also the decisions of Courts outside the State.

It is insisted by the appellee that the decree of the Chancellor is fully warranted by the rulings of this Court heretofore made. We do not think so. The earliest case in our reports is *Perry v. Patterson*, 5 Hum., 132. In that case a judgment creditor agreed with his debtor that he would grant him indulgence for twelve months if the latter would give him a note, with two good sureties, for the amount of the judgment. A note was made by the principal debtor, and signed by Perry as surety, but upon the distinct condition the principal would not deliver it to the payee, unless another person signed it as co-surety. The principal debtor failed to obtain the additional surety, and, in violation of the condition, and without the knowledge of the surety, he turned the paper over to the attorney of the creditor. This Court held that this note was an escrow, and that, having been delivered in violation of the condition making it such, the surety was not bound. In the course of the opinion, in commenting on the facts developed in proof, it is said: "It does not appear that the note was then received by the attorney in payment of the judgment, for he still insisted on having two sureties, as per agreement, and attempted by executions on the judgment to enforce

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performance, without success." And again the Court say: "But we think it obvious, from the proof, that the note was not delivered to the attorney in execution of the agreement between him and Perry, but merely *lodged with him* till such time as Francis S. Perry could be induced to sign it. We are constrained to believe that the note has been retained as the last resort, after other mode of enforcing payment had failed." In other words, in that case there was neither a full delivery of the note to nor a final acceptance of it by the payee or his agent, and its retention and attempted enforcement against the surety, under the circumstances, was a case of "last resort," and in flagrant violation of his rights.

With these facts fully ascertained, it becomes apparent that the statement in the opinion of the Court that "it makes no difference, though the attorney did receive the note without the knowledge that it had been conditionally executed by Simpson Perry; the note was not delivered to the attorney by him, and it was therefore necessary that he should have inquired as to the mode of its execution before he could claim to hold it discharged of the conditions," was unnecessary to the determination of the case, and therefore not binding as authority.

The case of *Carrick v. French*, 7 Hum., 457, simply holds that, to make out an escrow, the evidence must clearly show the surety signed on an express condition, and not upon a casual state-

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ment of the principal obligee that he intended to place on the paper other sureties, even if it appears that this statement was an inducement to the surety so signing. *Majors v. McNeilly*, 7 Heis., 294, and *Breedin v. Grigg*, 8 Bax., 163, were cases where the notes in question had been placed in the possession of their respective payees upon an understanding with these payees that they were conditionally delivered, and, in each case, it was properly held that the payees took them subject to the conditions imposed.

These are the Tennessee cases relied upon by the appellee, but we think it apparent that the decree in this case cannot safely rest on their authority.

The case of *Quarles v. Governor*, 10 Hum., 121, while not cited by the appellee, is frequently referred to as an authority for the general rule invoked by the surety in this case, and it is, therefore, proper to refer to it. In that case it was held that a surety on a bond for a Sheriff, received, approved, and ordered to be spread on the records of the Court, might show, when sued on this bond, he conditionally signed and delivered it to the Clerk of the Court. The decisions in *Bryan v. Glass*, 2 Hum., 390; *Governor v. Organ*, 5 Hum., 161; and *Ezell v. Justices*, 3 Head, 587, are not in accord with that case, and, as is said in *Amis v. Marks*, 3 Lea, 573, "perhaps announce the safer and better rule." Independent, however, of the question of the right of the surety in a summary proceeding, as that was, to impeach a

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judicial record by parol proof, it may be this case was rested by the Court upon the ground that the Clerk of the Court, who took the bond from the surety with full knowledge of the condition attached, was the statutory agent of the payee of the bond, and that notice to him was notice to his principal. Unless this be so, we do not believe the case to be reconcilable with the best considered authorities.

The appellant insists the question before us has been closed in this State ever since the opinion in *Jordan v. Jordan*, 10 Lea, 124. That was a suit by a *bona fide* holder of commercial paper, who recovered against a surety undertaking to defend upon the ground of his conditional delivery to the principal debtor, and of the latter's subsequent delivery of the note sued on, in violation of the condition, to the payee. The counsel for appellee, while conceding the soundness of the conclusion reached when confined to the subject of litigation in that case, yet urges that that decision rests upon an exception to the general rule made by the Courts in the interest of commerce, and that it cannot be relied upon as authority where the liability of a surety upon a non-negotiable instrument, delivered in violation of like conditions, is called in question. While it is true the case finally rests upon the fact the note sued on was negotiable, and passed, for value, without notice, and before maturity, into the hands of the payee, yet the reasoning and illustrating of the opinion

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embraces both negotiable and non-negotiable paper. The Court say: "The law makes the principal the agent of the sureties for the special purpose of delivering the instrument. * * * It is a case for the application of the ordinary principle of agency, that when the agent is clothed with apparent authority to do the act, he may bind the principal within the limits of that authority, whatever may have been his private instructions." In other words, the surety has innocently but negligently placed it in the power of his agent to inflict a loss upon another, who is equally innocent, and in no respect guilty of negligence. In such a case, the effect of the holding in *Jordan v. Jordan*, *supra*, was, whenever a loss occurred as the result of such negligence, to apply the rule announced in *Lickbarrow v. Mason*, 2 Dun & East, 21, that, "whenever one of two innocent persons must suffer by the acts of a third, he who has enabled the third person to occasion the loss must sustain it."

Conceding, however, that the announcement of this rule was dictum in that case, still the question recurs, Is the rule sound in principle and warranted by authority? That it is sound in principle we have no doubt, and that it should be applied in all cases like the one at bar is sanctioned by the great weight of authority, as we shall now see.

In *State v. Potter*, 63 Mo., 212 (Am. Rep., 21, p. 440), the Court says: "Here the surety who

defends this action had invested the principal with an apparent authority to deliver the bond, and there was nothing on the face of the bond, or in any of the attending circumstances, to apprise the official who accepted it that there was any secret agreement which forbade its acceptance. The surety is alone at fault in the matter, as, but for his unwarranted trust in Turley, the latter would never have had it in his power to occasion the loss which the beneficiaries of this bond must suffer if the defense made by the surety is successful. * * * Surely, then, a more opportune application of the language of Lord Holt, in *Hodge v. Nichols*, 1 Salkeld, 289, could not occur than to the case before us that, 'Seeing somebody must be the loser by the deceit, it is more reasonable that he that employs and puts trust and confidence in the deceiver should be loser than a stranger.'"

In *McCormick v. Bay City*, 23 Mich., 457, where the surety undertook to escape liability on the bond, signed and delivered under similar circumstances, the Court says: "It was in his (the surety's) power to insert the names of the desired sureties, and to make the bond joint, and not several. He took none of these precautions. On the other hand, he put it in the power of the principal debtor to get as many or as few sureties as he chose, and to deliver the bond in a shape and under circumstances raising no suspicion." To the same effect are the cases of *Webb v. Baird*, 27

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Ind., 368; *State v. Garten*, 32 Ind., 1; *State v. Peck*, 53 Maine, 284, and *Millet v. Parker*, 2 Met. (Ky.), 608.

In *Nash v. Fugate*, 24 Grattan, 202, the Court approvingly quotes and adopts the language of Judge Redfield, as follows: "Where the surety intrusts the bond to the principal obligor in perfect form, with his own name attached as surety, and nothing on the face of the paper to indicate that others are expected to sign the instrument, in order to give it full validity against all the parties, he makes such principal his agent to deliver the same to the obligee, because such is the natural and ordinary course of conducting such transactions; and if the principal, under such circumstances, gives any assurances to the surety in regard to other sureties, or performing any other condition which he fails to perform, the surety, giving confidence to these assurances, must stand the hazard of their performance, and he cannot implicate the obligee in any responsibility in the matter, unless he is guilty of fraud or rashness in accepting the security."

In *Dair v. United States*, 16 Wallace, 1, the Supreme Court of the United States adds the great weight of its sanction to this view, and applies the rule of estoppel *in pais* to a surety in such a case as the one before us, and shows that the case of *Pawling v. United States*, 4 Cranch, 219, which was referred to by the appellee as supporting the opposite view, has been misinter-

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preted, and is, in fact, no authority against the rule announced in the former case.

As against the rule so announced, only a limited number of Courts have ranged themselves. In *Peoples v. Bostwick*, 32 N. Y., 445, the opposite rule—that is, the one invoked in this case, and upon which the decree of the Chancellor was predicated—was distinctly stated and adopted, but the authority of that case was much weakened, if not effectually destroyed, by the doubt as to its soundness, suggested in *Russell v. Frees*, 56 N. Y., 67. The case of *Smith v. Kirkland* (Alabama), 1 Southern Rep., 276, is in accord with *Peoples v. Bostwick*, *supra*, but it rests alone on the authority of earlier Alabama cases. In Georgia the same view is taken in *Crawford v. Foster*, 6 Ga., 202.

We are satisfied to adopt the rule, as found in *Dair v. United States*, *supra*, and *Nash v. Fugate*, *supra*, and other similar cases, already referred to, as resting on sound principle, and sustained by the weight of authority. We agree with the Court in *Nash v. Fugate*, when it says “it is impossible to foresee the mischief of adopting a different rule.” For “one obligee, having in his possession an instrument signed by responsible parties, to all appearance complete and valid, may, at any distance of time, be confronted and defeated by a secret parol agreement between the principal obligor and some one of the sureties, of the existence of which he had not even a suspicion. How is it possible to provide against these secret agree-

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ments? How are they to be met and disproved? In the nature of things, the obligee can offer no evidence besides the bond, as the knowledge of the condition is generally confined to the principal obligor and his sureties."

It is proper to add that, in all such cases, to give the holder the benefit of the rule here announced, it must affirmatively appear, as it does in this case, that he took the instrument in question without notice of its conditional delivery.

The decree of the Chancellor is reversed, and the cause is remanded for an account upon the principles of this opinion.

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CRAWFORD v. CARROLL.

(Knoxville. October 16, 1894.)

EXEMPTIONS FROM DEBT. *Judgment for value of exempt property is exempt.*

A judgment, obtained by the owner of exempt property against a tortfeasor for its wrongful conversion or destruction, is exempt from the owner's debts in like manner as the property itself had been.

Code construed: § 2931 (M. & V.); § 2108a (T. & S.).

Cases cited and approved: Duff v. Wells, 7 Heis., 17; Hall v. Fulghum, 86 Tenn., 451; White v. Fulghum, 87 Tenn., 281.

FROM KNOX.

Appeal in error from Circuit Court of Knox County. S. T. LOGAN, J.

T. L. CARTY for Crawford.

TEMPLETON & CATES for Carroll.

BEARD, J. The defendant in error, one Carroll, is the head of a family, and lives in Knox County. He owned but two horses, one of which was negligently killed by the railroad. He instituted suit and recovered a judgment against the road for the value of this horse; and this judgment a garnishing creditor sought, by proper process, to subject

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to the satisfaction of his debt. This claim was resisted by the owner of the judgment, on the ground that it stood in the room and stead of the horse so killed, and, as the latter was exempt property, the judgment was equally protected by § 2931 of the (M. & V.) Code. The Circuit Judge found, as matter of fact, that the horse in question was exempt, and that the recovery made was for its value, and, as a matter of law, that this recovery was equally exempt with the property itself, and he therefore discharged the garnishment. The garnishing creditor has appealed, and assigns as error this conclusion of law of the Court below.

Was the Circuit Judge right in holding that the unsatisfied judgment for the value of this exempted property, of which its owner has been involuntarily deprived by a tort-feasor, stood in the place of the property itself, equally entitled to the protection of the exemption law?

This question has already been practically settled by this Court. In the case of *Duff v. Wells*, 7 Heis., 17, it was considered, and, notwithstanding the obscurity of the opinion, growing out of the meagerness of the statement of facts by the reporter, it is sufficiently explicit to show that there was an effort to set off a judgment for a debt against another judgment in the same Court for the wrongful taking of exempt property, and it was held that this right of set-off could not be exercised so as to defeat the operation of the exemption laws. It is true, the conclusion of the

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Court was rested, to some extent, upon another consideration than the one now in hand, yet it is apparent that the Court was equally controlled by the fact that an application of the doctrine of set-off in that case would "defeat the policy of the law exempting, for the benefit of families, property from execution." This recognition of the policy of the exemption law, and its invocation by the Court, necessarily involved an admission that the judgment for the tortious conversion of exempted property, equally with the property so converted, was under the protection of the statute in question.

The same question was presented to this Court in the case of *Hall v. Fulghum*, 2 Pickle, 282, and more distinctly in the later case of *White v. Fulghum*, 3 Pickle, 281. It is true those cases involved homestead exemption rights, but the same policy which has provided a homestead for the poor man, exempt from the reach of his creditors, has dictated the various acts of the Legislature providing equal exemption for him in his holding of various articles of personal property, and there can be suggested no sound reason why the rule adopted in one class of cases should not be enforced in the other.

In *White v. Fulghum*, *supra*, a mortgage was foreclosed in the Chancery Court, at the instance of the mortgagee. In this mortgage, the mortgageor and his wife had waived their homestead right. At the sale, under the foreclosure decree,

the property realized a sum in excess of the mortgage debt. Judgment creditors of the mortgageor filed their bill to reach this excess, among other grounds on this, that the foreclosure proceedings extinguished the mortgageor's right of homestead, and left the surplus of the fund subject to the debt of the complainant, as non-exempt property. The Court, in its opinion, while conceding that the proceedings in question had extinguished the homestead right in the land itself, adds that "it by no means follows that it extinguished his right of homestead in the proceeds of the land. The mere fact that the land has been converted into money, and that money, as such, cannot be enjoyed as a homestead, does not destroy the right of homestead after it has once attached to the land. The fund realized from the sale of the land represents the land itself, and is subject to the same laws and rights. It stands in the place of the land, and those having an interest in the latter have the same interest in the former."

These cases are decisive of the question at bar. To hold that this involuntary conversion of exempt property into a judgment against the tort-feasor for its value, destroyed the quality of immunity from creditors of its owner that inhered by the statute of exemption in the property itself, would be to stick in the bark, and violate the spirit and policy of a wise and beneficent statute.

While unnecessary, it may be proper to add that the rule adopted by this Court has met

Crawford v. Carroll.

the approval of other Courts, and is embodied in the text of Freeman on Executions, Vol. I., Sec. 235.

Judgment of the Court below is affirmed. The costs of this Court will be paid by plaintiff in error and his surety, and of the garnishment proceedings in the lower Court by the garnishing creditor.

Ross v. Meek.

ROSS v. MEEK.

(Knoxville. October 23, 1894.)

1. CHANCERY PRACTICE. *Final decree at return term proper, when.*

Final decree may be properly entered in a chancery cause at the return term of the process, where, after demurrer had been interposed and overruled, *pro confesso* was properly entered in default of an answer, which, under the practice of the Court, operated as an admission of averments of the bill, sufficient, without other proof or a reference, to entitle complainant to the relief sought.

Code construed: §§ 5112, 5113, 5137, 5138 (M. & V.); §§ 4369, 4370, 4394, 4395 (T. & S.).

Case cited and approved: *Stone v. Duncan*, 1 Head, 103.

2. SAME. *Effect of pro confesso.*

Where, in a suit upon a note exhibited with the bill, the complainant distinctly avers ownership of the note in himself, but his name appears indorsed in blank upon the back of the note, *pro confesso* operates as an admission by defendant of the fact of ownership as stated on the face of the bill.

FROM KNOX.

Appeal from Chancery Court of Knox County.
H. R. GIBSON, Ch.

JOHN W. YOE for Ross.

WASHBURN, PICKLE & TURNER for Meek.

ROSS v. MECK.

WILKES, J. This is a suit on a note exhibited with the bill. Subpœna to answer was served in time for the May term, 1893. On May 25 defendant appeared and filed a demurrer to the bill. On June 3 the demurrer was overruled, but no order was entered directing an answer to be filed, or fixing any rule-day by which it should be filed. On June 15, defendant having failed to make any other defense, an order *pro confesso* was taken without objection, and on the next day, June 16, a final decree, based on the judgment *pro confesso*, was entered, from which defendant appeals to this Court, and he now assigns as error that the final decree was prematurely rendered, and the cause could not be set for hearing and disposed of at the return-term of the process under the state of pleading in this case.

The Code, § 4394 (M. & V., § 5137), provides: "A demurrer or a plea shall be set for argument at the first term."

Section 5138 (M. & V. compilation), is as follows: "Upon a plea or demurrer argued and overruled, no other plea or demurrer shall be received, but the defendant shall answer the allegations of the bill; and, in case he fails to do so by the next rule-day, or by the time prescribed by the Court, the bill may be taken for confessed, or answer enforced by contempt, as if no such plea or demurrer had been filed."

Section 5112 (M. & V.) prescribes five cases in which the bill may be taken for confessed. The

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fourth of these cases is when, a plea or demurrer having been overruled, and the defendant ordered to answer the bill, he fails so to do upon a rule given.

Section 5113 provides that, in the first and second of the above cases, the cause may be set for hearing at the return-term of the process; in the other cases, at the next term after the bill is taken for confessed.

It is insisted that, under these rules of practice, when a plea or demurrer is overruled, the cause may be taken for confessed at that term, but cannot be heard upon the merits until the next term after the bill is taken for confessed. We do not think this the proper construction of subsec. 4, § 5112, before referred to, but that this subsection refers to cases in which the complainant desires to *compel* an answer from the defendant, and, for that purpose, the Court *orders* an answer to be filed, and fixes a rule-day limit, occurring after the close of the pending term. In such case, if the defendant fails to answer by such rule-day, complainant may take his bill for confessed, and the cause shall then stand for hearing at the next term. When the decree overruling the demurrer makes no order for an answer, the defendant has the privilege, under the statute, to answer at once, or at such time as the Court may permit, but, in this case, the defendant answers under the general provisions of the law and not in consequence of any order of Court compelling an answer, and if he

fails to answer or obtain time, the *pro confesso* can be taken forthwith.

The effect of a *pro confesso* is an admission by the defendant that the allegations made in the bill are true. *Stone v. Duncan*, 1 Head, 103.

These allegations may be sufficient to warrant the rendition of a decree without more, as, when the action is based upon a note, or when they are sufficiently definite to fix not only the ground of the defendant's liability, but also the amount. In such case, final decree may be taken at once. If, however, the complainant desires to *compel* an answer, and time is extended until after the term to make it, or the allegations are not sufficiently definite to fix the amount of liability and proof, or an account is necessary for that purpose, then the case stands for trial at the next term after the *pro confesso* is taken.

It was never intended by the statute referred to, or by the rules of practice adopted by the Chancellors and enacted into law, which are in accord therewith, that a defendant may put in a formal, insufficient plea or demurrer, and, when that is overruled, neglect or refuse to make other defense, and thereby postpone the hearing of the case and the rendition of a final decree to a subsequent term, when the suit is on a plain note or other evidence of debt, or the allegations taken for confessed need no proof to make them definite as to the extent of defendant's liability.

It is again assigned as error, that the note sued

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on appears to have complainant's name on its back in blank, and that this, without explanation, puts the title to the note out of the complainant, and he has no right to sue.

It is sufficient to say that the bill expressly avers ownership by the complainant, and, no plea or answer being filed, the ownership is admitted by the *pro confesso* allowed to be taken.

There is no error in the decree of the Chancellor, and it is affirmed with costs.

Galyon v. Gilmore.

GALYON v. GILMORE.

(Knoxville. October 25, 1894.)

1. HOMESTEAD. *County Court has not jurisdiction to assign, when.*

The proceedings of a County Court, though had without objection of parties, are void even upon collateral attack, for want of jurisdiction in the Court, and estop no one, whereby the homestead reserved in general terms by an insolvent debtor in making a general assignment is set apart to him, under decrees of the Court, upon the petition of the assignee filed against the debtor for that purpose alone.

Code construed: §§ 4980-4984 (M. & V.).

Cases cited: *Rhea v. Meredith*, 6 Lea, 605; *Arnold v. Jones*, 9 Lea, 545; *Dean v. Snelling*, 2 Heis., 484-487; *Agee v. Dement*, 1 Hum., 332; *Dickson v. Caruthers*, 9 Yer., 30.

2. SAME. *Waiver of right not presumed.*

Where an insolvent debtor reserved his homestead in general terms in making a general assignment, and, by a subsequent arrangement between himself and the assignee, was assigned as homestead a portion of the estate incumbered with a lien, it is the duty of the assignee, in the absence of an express agreement of the debtor to assume the risk of the lien, to protect the homestead by paying off the lien out of the assets assigned, and upon his failure to do so, and consequent loss of the homestead, the debtor will be indemnified by an allowance out of the funds in the assignee's hands.

Cases cited and approved: *Gray v. Baird*, 4 Lea, 212; *Bennett v. Austin*, 10 Lea, 564; *White v. Fulghum*, 87 Tenn., 281.

3. SAME. *Same.*

And any agreement of the debtor to waive any of his rights to homestead must, in such case, be established by plain, positive, and direct proof.

FROM KNOX.

Appeal from Chancery Court of Knox County.
HENRY R. GIBSON, Ch.

Galyon v. Gilmore.

COOPER & DAVIS for Galyon.

COMFORT & SPILMAN for Gilmore.

WILKES, J. Complainant, Galyon, being insolvent, in May, 1891, made a general assignment to defendant, Gilmore, for the benefit of all his creditors. The deed of assignment embraced several pieces of real estate, and made a reservation, in general terms, of his homestead, without specifying any particular land out of which it should be assigned.

The trustee afterward filed a petition in the County Court of Knox County, making Galyon and wife parties respondent thereto, and asking that Court to set apart the homestead thus reserved. Galyon and wife answered this petition, and requested that their homestead be set apart out of certain property situated on the Tazewell Pike. It was known to them and to the trustee that there was an incumbrance upon this land in the shape of a vendor's lien for purchase-money for something over \$2,000.

An agreed statement of facts is filed, in which it is recited that Galyon and wife supposed the remainder of the lot, after assigning homestead, would be sufficient to discharge the vendor's lien, or, if it did not, the trustee would remove the incumbrance on the homestead out of the proceeds of the other lands conveyed. Homestead was accordingly set apart by metes and bounds out of

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said property on the Tazewell Pike so incumbered, and the trustee, thereupon, sold the remainder of the real estate conveyed to him, except that on the Tazewell Pike, and leaving the complainants, Galyon and wife, in possession of that portion of the Tazewell Pike lot set apart to them as their homestead.

Afterwards, the vendor's lien on this Tazewell land was enforced by bill in chancery, the part left after setting aside homestead, being first sold, and, this not bringing enough to satisfy the lien, the homestead part was also sold, the proceeds of the entire tract being required to pay the vendor's lien and costs, leaving no surplus, and complainants ousted of their homestead. The other real estate conveyed to the trustee has been sold by him, and, after paying off incumbrances, the trustee has a balance of proceeds in his hands.

Galyon and wife thereupon filed this bill, setting out the facts as above stated, and asked that out of the proceeds of the assigned property now in the hands of the trustee, or that may hereafter come into his hands, \$1,000, be set apart and invested in a homestead for them in the manner prescribed by law.

The cause was heard upon the agreed statement of facts, when the Chancellor was of opinion that complainants were not entitled to any relief, and the bill was dismissed at complainants' cost, and they have appealed and assigned as error the action of the Chancellor in refusing the relief prayed.

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It is insisted the assignment of homestead, made under the decree of the County Court, was upon condition—

First.—That the land out of which it was assigned would be sufficient to discharge the vendor's lien, and leave enough to make out the homestead allowance of \$1,000 for complainants.

Second.—That the part allotted as homestead would be relieved out of the proceeds of the other assigned property.

The exact terms of the decrees of the County Court are not set out in the agreed statement of facts, but it is not insisted such conditions and stipulations were specified in the decree of that Court.

Third.—That the proceeding in the County Court did not constitute a selection and setting apart of the homestead to which complainants were entitled under the law, since the property set apart was incumbered beyond its value by vendor's liens superior to the homestead right, and had since been taken to satisfy these liens.

Fourth.—Because if said allotment should be held good and conclusive, yet it was the duty of the assignee to relieve the homestead of incumbrances out of the proceeds of other land, and, this not having been done, this Court should now set apart a fund for homestead purposes out of the proceeds of the other lands, and thus grant relief and save the homestead right.

On the other hand, defendant insists that the

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homestead having, by consent and at the instance of complainants, been set apart out of certain land, it was *res adjudicata*, and complainants took the land allotted them subject to all risks, so far as the liens upon it were concerned, and the decree and action of the County Court cannot now be questioned; that the decree of allotment was not conditional, and that no provision was made to have the trustee relieve the incumbrance out of the proceeds of other property, and that the remainder of the property and its proceeds were relieved of the homestead claim; and that the loss of the homestead has resulted from a depreciation in the value of the property.

The statutes do not provide the manner in which homestead shall be assigned when there is a general reservation of it in an assignment, as it does when the property is levied upon, or it becomes necessary, on the death of the owner, to assign it to his widow.

Had the County Court any jurisdiction to allot and set apart homestead in kind in this case? In *Rhea v. Meredith, Adm'r, et al.*, 6 Lea, 605, it was held that the County Court has jurisdiction, under §§ 4980-4 of the Code (M. & V.), to assign and set apart homestead, as well as dower, when an insolvent estate is being wound up in that Court, and that such assignment cannot be attacked in chancery by creditors dissatisfied with the allotment unless allegations sufficient to impeach a decree are made.

Having the jurisdiction to settle insolvent estates, the County Court, as an incident thereto, has the power to set apart homestead in order to ascertain what remains to be sold without the incumbrance of the homestead. It has also been held that the Circuit Court has power to assign homestead in an action of ejectment pending in that Court. *Arnold v. Jones*, 9 Lea, 545.

But in both these cases the power to allot homestead is a necessary incident to the proper exercise of a jurisdiction already acquired by the Court upon other grounds.

Here the action brought in the County Court was alone for the purpose of allotting homestead, and the power to allot did not depend upon or arise out of a jurisdiction already rightfully acquired on other grounds. It is probable that, in such case, the Chancery Court alone would have the power to allot the homestead, either by setting it apart in kind or directing \$1,000 of the proceeds to be invested as the law provides, but this power would very safely rest on the general jurisdiction of Chancery Courts to enforce trusts and remove liens and incumbrances. No such general jurisdiction exists in the County Court, and that Court had no jurisdiction to allot homestead under the facts as presented. It was not a case of partition, and, even if it was, the County Court could not have taken jurisdiction on account of the incumbered condition of the lands, nor could the consent or acquiescence of the complainants

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in this case, who were respondents in that, confer or aid the jurisdiction. *Dean v. Snelling*, 2 Heis., 484-7.

The County Court having no jurisdiction of the subject-matter, the decree, though consented to, is absolutely null and void. *Agee v. Dement*, 1 Hum., 332; *Dickson v. Caruthers*, 9 Yer., 30; *Dean v. Snelling*, 2 Heis., 484.

It is insisted, however, that the debtor selected the Tazewell land for his homestead, and thereby took the risk of the incumbrances on it, and that the homestead has been lost in consequence of a depreciation in the value of the property.

Suffice it to say, such case is not presented in the agreed state of facts. There is nothing to show any depreciation in the property, and there is no direct evidence of any agreement on the debtor's part to take the homestead subject to the risk of its being taken by superior incumbrances. If the debtor had made such an agreement, he would be bound by it, and, even if the County Court proceeding was void, he would be estopped to claim any different homestead, because of his agreement to take the incumbered one subject to the lien, and at his own risk. We think it was never contemplated by the trustee or the debtor that the latter should take the risk of this incumbrance, but, evidently, both trustee and debtor acted upon the idea either that the remainder of the Tazewell land would be sufficient, when sold, to extinguish the lien and leave the homestead

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free of incumbrance, or that such incumbrance would be removed by the proceeds of other property conveyed. And, if there was no express agreement on the part of the trustee to protect the homestead from incumbrance, such a duty arose as a matter of law. In order to set up and establish such an agreement, when the effect would be to defeat the homestead right, it would require plain, positive, and direct proof, and such agreement will not be raised by inference to defeat a right which the law favors and the Courts will aid by a liberal construction.

In the absence of any express agreement, the sale of the remaining lands by the trustee will not defeat complainant's right to homestead, which he expressly reserved in his assignment, and he will now be entitled to a homestead provision out of the proceeds of the property sold. *Gray v. Baird*, 4 Lea, 212; *Bennett v. Austin*, 10 Lea, 564; *White v. Fulghum*, 3 Pick., 281.

The decree of the Chancellor is reversed, and the cause is remanded to the Court below, to the end that, out of the proceeds in the hands of the trustee, or that may come into his hands, from the sale of the assigned property upon which there are not liens superior to the complainants' homestead, \$1,000 may be invested in a homestead for complainants according to law. The costs of the appeal will be paid by defendant, Gilmore, out of the trust-funds in his hands.

State, *ex rel.*, v. Butcher.

STATE, *ex rel.*, v. BUTCHER.

(Knoxville. October 25, 1894.)

WORK-HOUSE LAW. *Repeal of special Act for Knox County.*

The general Act of 1891, Chapter 123, providing one universal plan or system for organization and management of county work-houses, and covering the entire subject-matter of legislation, and containing provisions radically different in many material particulars from those of all earlier statutes, and embodying an express repeal of certain general statutes on the subject, and a declaration of repeal of all other statutes in conflict with its provisions, operates to repeal, by implication, the special local Act of earlier date, providing a radically different method for the management of the work-house of Knox County.

Acts construed: Acts 1891, Ch. 123; Acts 1887, Ch. 184.

Cases cited: *Poe v. State*, 85 Tenn., 495; *The Druggist Cases*, 85 Tenn., 450; *Cole Manufacturing Co. v. Fall*, 92 Tenn., 607; *Durham v. State*, 89 Tenn., 728; *State v. Wilson*, 12 Lea, 246; *Mayor v. Dearmon*, 2 Sneed, 104, 120; *Willaford v. Pickle*, 13 Lea, 672; *State v. Bank*, 16 Lea, 111.

FROM KNOX.

Appeal from Chancery Court of Knox County.
JOSEPH W. SNEED, Sp. Ch.

WALTER M. COCKE for Relator.

COMFORT & SPILMAN for Butcher.

WILKES, J. This is a bill by the relator, a citizen of Knox County, under Section 4146 of the

State, *ex rel.*, v. Butcher.

Code (M. & V.), to test the right of respondent, Butcher, to hold the office of superintendent of the work-house of Knox County. An answer was filed by respondent, and the relator set the cause for hearing upon the bill and answer.

On the hearing, the Special Chancellor, J. W. Sneed, was of opinion, and decreed, that the respondent is the rightful incumbent of the office of superintendent of the work-house of Knox County, and the bill was dismissed at the cost of the relator. He has appealed, and now insists that the Chancellor erred in holding that the Act of 1891, Chapter 123, under which relator was elected, repealed the Act of 1887, Chapter 184, under which the relator claims the superintendent should have been elected.

The question submitted to the Court is one purely of law, to be determined by the construction of the two statutes referred to, as well as others relating to the work-house system.

The Code, § 5410 (M. & V., § 6256), conferred on the County Courts of the several counties of the State authority to purchase sites and build and establish work-houses, and adopt rules and regulations for their government and management.

The Act of 1875, Chapter 83, provided a general system for the regulation and management of work-houses. By Section 10 of this Act it was provided that the superintendent should be elected and his compensation fixed by the Quarterly Court, and in case of the failure of the Court to elect,

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by Section 12 the County Jailer was made superintendent *ex officio*.

It was further provided by that Act that inmates should have a credit of twenty-five cents for each day's work of ten hours. This general Act was amended by the Act of 1883, Chapter 23, which elaborates the provisions of the former Act for hiring out the convicts, and requires that they shall remain under the care and control of the superintendent while hired out. A special Act was passed in 1887, being Chapter 184, providing that the superintendent of the work-house in Knox County shall be elected by the qualified voters of said county, and hold his office for a term of two years, the election to occur at the same time with the regular county elections. This is a special Act, and relates only to Knox County. The duties required of the superintendent are substantially those prescribed in the Acts of 1875 and 1883, with some additional provisions, among others, that the superintendent should not, directly or indirectly, be a party to a contract for feeding the prisoners, and should receive out of the county treasury a salary of \$1,200 per annum, and be subject to the orders of the County Court. The only important changes made by this Act from the general system existing previously were that the superintendent was elected by the people instead of the County Court, and his salary was fixed by statute instead of by the County Court.

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This Act repeals no part of the former Acts, and does not refer to them in any way.

The next Act is that of 1891, Chapter 123, being a general Act for the establishment and management of work-houses throughout the State. The general provisions of this Act are, in some respects, the same as the Acts of 1875 and 1883, but, in other respects, are radically different, and, by express reference, it repeals both of the former Acts, as well as all other Acts and laws and parts of laws in conflict with the Act passed, but without specifying any other.

• It is now insisted that this Act is inconsistent with the Act of 1887, and, by necessary implication, repeals it; and it is intended thereby to establish a uniform system of work-houses in all counties of the State. By the Act of 1891, the work-houses are put under the control and management of a Board of Work-house Commissioners, to be elected by the County Court, and it becomes the duty of this board to elect or appoint a superintendent, removable at their pleasure, and all necessary guards and other employes, and generally to regulate and control that department. It changes the credit to be allowed the convict for a day's work from twenty-five cents to forty cents, and gives the commissioners authority to allow good time to convicts, and to discharge them for ill health, on the certificate of a physician, or whenever they deem it best for the interest of the institution.

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It is argued that these provisions are intended to apply to all work-houses and convicts confined therein throughout the State, and that they cannot be applied to Knox County, under the Act of 1887, and, hence, the Act of 1887 is repealed by necessary implication.

Comparing these several Acts, it is insisted there is no good reason why the Act of 1887, Chapter 184, cannot co-exist with the Act of 1891, as it did with the Acts of 1875 and 1883. It is conceded the details of the Act of 1891 are, to some extent, different from those of the former Acts, but the general objects and provisions are the same.

By the Act of 1891, as well as by the Acts of 1875 and 1883, the Legislature intended to provide a general system for work-houses. By the Act of 1887, the Legislature intended to make a special provision in regard to the superintendent of the Knox County work-house.

It is further insisted that the Act of 1887 was a special Act, relating to Knox County, and if the Legislature had intended to repeal it by the Act of 1891, it would have been so expressly provided, and, further, that being a special Act, a general law passed subsequently will not repeal it by mere implication; and this is the general rule of law. See authorities collated in 23 Am. & Eng. Ency. Law, 422; Endlich on Statutes, 227.

It is said we have no express adjudication upon this question of a repeal of a special Act by a general law, but it is conceded that our cases are

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uniformly to the effect that repeals by implication are not favored, and an Act will not be held to repeal another Act by implication unless it clearly appears that the two Acts cannot stand together, and the repugnancy between the two Acts must be plain and unavoidable.

In *Poe v. The State*, 1 Pickle, 495, it is held that a statute inconsistent with, and embracing the entire subject-matter of, a former statute, repeals it either with or without a repealing clause. See also *The Druggist Cases*, 1 Pick., 450; *Cole Manufacturing Co. v. Fall*, 8 Pickle, 607. And this is true even when material provisions of the former statute are omitted. *State v. Terrell*, 2 Pickle, 523.

It is also held that an implied repeal results from an enactment the terms and necessary operations of which cannot be harmonized with the terms and necessary effect of an earlier Act. Sutherland on Statutory Construction, Sec. 138; *Durham v. State*, 5 Pickle, 728.

In Endlich on Interpretation of Statutes, Sec. 231, p. 310, it is said: "An intention to supersede local and special Acts may be gathered from the design of the Act to regulate by one system or provision the entire subject-matter thereof, and to substitute for a number of detached and varying enactments one universal and uniform rule throughout the State. Accordingly, it has been held that statutes fixing the terms of officers in certain counties are to be deemed repealed by implication by a general statute fixing the terms of

officers of that class throughout the State." Page 311. See also *State v. Wilson*, 12 Lea, 246; *Mayor v. Dearmon*, 2 Sneed, 104, 120; *Willaford v. Pickle*, 13 Lea, 672; *State v. Bank*, 16 Lea, 111.

The evident purpose of the Act of 1891 was to provide one general system for work-houses throughout the State upon one uniform plan. It is repugnant and inconsistent with the Act of 1887, in that the former gives the control of the work-house to the County Court and superintendent, while the latter gives it to the Commissioners. The full control given by the Act of 1891 to the Commissioners is entirely inconsistent with the control given by the Act of 1887 to the superintendent.

By the Act of 1887, the Superintendent is a county officer, independent of the Commissioners, and holding his office not by their selection, and removable at their discretion, but under an election by the people, and for a definite term of two years. Convicts throughout the State, under the Act of 1891, are credited for their work at the rate of forty cents per day, while, under the Act of 1887, those confined in the Knox County work-house could only have credit for twenty-five cents per day. Under the Act of 1891, they are entitled to credit for good time, and to be discharged for sickness in certain cases and at the discretion of the Commissioners, none of which provisions are in the Act of 1887, and hence could not apply to prisoners confined in the Knox County work-house.

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We think there is such inconsistency and repugnancy between the two Acts that the latter Act of 1891 must be held to have repealed the Act of 1887, and respondent, being elected under the Act of 1891, was the rightful incumbent of the office when this bill was filed, and could not be removed therefrom, and the decree of the Chancellor is affirmed, and bill dismissed at cost of the relator.

Underwood v. Smith.

UNDERWOOD v. SMITH.

(Knoxville. October 25, 1894.)

LIBEL. *Res adjudicata.*

A person responsible for the publication of a libel in different newspapers on different days, cannot plead a recovery for a publication in one paper on one day in bar of an action for a publication in another paper on a different day.

Cases cited: *Saunders v. Baxter*, 6 Heis., 369, 392; 94 U. S., 477; 16 N. Y., 548; 32 Am. Dec., 448.

FROM KNOX.

Appeal in error from Circuit Court of Knox County. S. T. LOGAN, J.

HENDERSON & JOUROLMON for Underwood.

WILLIAMS, HENDERSON & DAVIS for Smith.

WILKES, J. Defendant, Smith, wrote an article, which was published, at his request, on the evening of April 11, 1892, in the Knoxville *Evening Sentinel*. The same article was republished by the Knoxville *Daily Tribune* on the morning of April 12, 1892.

Soon thereafter plaintiff, Underwood, brought suit against defendant, Smith, for libel, based on the publication in the *Evening Sentinel*. The cause came to a hearing, and resulted in verdict and judgment for the plaintiff for \$340.

April 6, 1893, the plaintiff brought the present

suit against the defendant, Smith, for libel, based on the publication in the *Tribune*. Pleas of *res adjudicata* and not guilty were filed, and the former was sustained by the Circuit Judge, and plaintiff's suit was dismissed, from which judgment of the Circuit Judge plaintiff appealed, and has assigned as error the action of the trial Judge in sustaining the plea of *res adjudicata*, and in not hearing the cause upon the merits under the plea of not guilty. An agreed statement of facts is made, and it appears that both publications are of identically the same matter, one being made in the *Sentinel* on the evening of April 11, and the other in the *Tribune* on the morning of April 12; that the two papers have a number of subscribers in common, but each has subscribers that the other has not.

The Circuit Judge was in error in sustaining this plea of *res adjudicata*. Every separate and distinct publication of a libel is a distinct offense, for which a separate action will lie, and a recovery of damages for the first publication of the libel is no bar to an action based upon its repetition or republication. Newell on Defamation, p. 350, § 3; Odgers on Libel, p. 277, § 160; *Rex v. Carlile*, 1 Chitty, 453; Pollock on Torts, p. 315.

In the action upon the libel in which judgment has heretofore been rendered, there is no mention made of repetition or republication of the libelous matter, and it was in nowise involved, and evidence of it would, perhaps, have been inadmissible. *Saunders v. Baxter*, 6 Heis., 369, 392.

The rule which requires a party not to split his cause of action, and prosecute it by piecemeal, does not require that distinct causes of action, each of which would authorize independent relief, should be presented in a single suit. And this is true, even though the several causes of action may exist at the same time. Black on Judgments, Vol. 2, Sec. 344; *Stark v. Starr*, 94 U. S., 477; *Secur v. Sturgis*, 16 N. Y., 548; *Berdaugh v. Cocke*, 32 Am. Dec., 448.

The doctrine of *res adjudicata* is based upon reasons and principles which have no application to the case at bar. In order to sustain the plea, the causes of action must be the same, between the same parties, based upon the same evidence, and resulting in damages based on the same reasons.

In the case of these two publications the evidence in the one case would not apply, except in part, to the other case.

The time and fact of publication are different in the two cases. The papers in which the publications are made are not the same. The possible defendants are not the same. In the former case, the publisher of the *Sentinel* could have been joined, but not the publisher of the *Tribune*, and *vice versa*.

The parties receiving the publication are not altogether the same; and it may be the damage sustained is not the same in the latter as in the former case. While it is true that one recovery in an action for libel is a bar to a second recov-

ery for the same cause of action, as in all other suits, still it is no bar when there is a separate and distinct cause or ground of action for a repetition of the libel, which is a similar but not the same offense, any more than a judgment for one assault and battery would bar an action for a second assault and battery by the same person on the same party.

Townshend, in his work on Libel, says, in substance: If one copies the subject-matter of a writing upon another piece of material, the copy is no more the same subject-matter with the original than is a repetition of a sound the same as the original sound. Townshend on Libel, Sec. 117.

Again, the same writer says: "It is no bar to an action for slander or libel that, in a former action, for the publication of the *same words* on an occasion different from that alleged in the declaration, the defendant obtained a verdict and judgment in his favor. It was not for the same cause of action." Townshend on Libel, Sec. 251, page 442 (4th Ed.).

The judgment of the Circuit Judge is reversed, and, inasmuch as no evidence on the merits was given under the plea of not guilty (the suit having been dismissed on sustaining the plea of *res adjudicata*), the cause will be remanded to the Circuit Court, to be further proceeded in on the merits.

The appellee will pay the costs of the appeal.

Grant v. Lookout Mountain Co.

GRANT v. LOOKOUT MOUNTAIN CO.

(Knoxville. October 25, 1894.)

1. CORPORATIONS. *Liability for stockholders' attorney fees.*

A corporation is liable for complainants' reasonable attorney fees, incurred in the successful prosecution of a just and necessary suit by a minority of its stockholders against itself, its officers and directors, for the benefit of the company, to enjoin the fraudulent disposition of its properties, or to recover properties already fraudulently transferred. (*Post*, pp. 694-701.)

Cases cited: Wallace v. Bank, 89 Tenn., 635; Deaderick v. Wilson, 8 Bax., 131; 45 Fed. Rep., 668; 17 Fed. Rep., 48; 105 U. S., 527; 113 U. S., 116; 151 U. S., 343.

2. SAME. *Same. Lien.*

And the attorney fees, in such case, constitute a lien upon the property recovered by the suit.

Cases cited and approved: Perkins v. Perkins, 9 Heis., 95; Keith v. Fitzhugh, 15 Lea, 50; Garner v. Garner, 1 Lea, 29.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.

T. M. McCONNELL, Ch.

COOKE, FRAZIER & SWANEY for Grant.

WATKINS & BOGLE for Lookout Mountain Company.

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McALISTER, J. The single question presented for determination in this cause is whether complainants below are entitled to have counsel fees allowed and declared a lien on the property recovered. The proceedings in which the professional services were rendered were commenced by M. Grant and others, minority stockholders in the Lookout Mountain Company, against said corporation and certain officers and directors therein, to enjoin a sale of all the real and personal property of the corporation to a Boston syndicate, to be paid for in bonds covering the property of defendant corporation and two other corporations, known as the "Lookout Mountain Hotel Company" and the "Chattanooga and Lookout Mountain Railroad Company." The bill charged, first, that the proposed sale of the entire property of the corporation was *ultra vires*, and, second, that the proposed transaction was fraudulent in this, that the majority stockholders in the Lookout Mountain Land Company were also the owners of a majority of the stock in the hotel and railroad companies; that the last two corporations were insolvent, and that these majority stockholders were using their power to sacrifice the land company for the benefit of their interests in the two insolvent corporations. Answers were filed by all the defendants, and, upon motion, the injunction was dissolved.

It appears that the original contract was not attempted to be carried out, but a second contract was made, by which a deed was executed to all

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the real estate to Baxter, and the personalty sold him, in consideration of his promissory note for \$200,000, due in ten years. No security was given upon the note, and the bill charged that Baxter was insolvent. An amended and supplemental bill was then filed by said minority stockholders to cancel the deed to Baxter and recover the property, and to prevent the consolidation of said Lookout Mountain Land Company with the other two corporations.

Answers were filed by the defendants, proof was taken, and a decree pronounced by Chancellor McConnell in favor of complainants, in accordance with the prayer of their bill. The deed was canceled, and the possession of all the realty and personalty described in the bills was decreed to be restored to the Lookout Mountain Company, and, if necessary, a writ of possession was ordered to issue. It should be remarked that the deed executed to Baxter conveyed real estate on Lookout Mountain, valued at \$500,000, and also real estate notes belonging to the company, amounting to about \$50,000, and that all of this property was recovered by the principal decree, and restored to the corporation. The minority stockholders, who had thus conducted the litigation to a successful termination, thereupon moved the Court for a reference to cover their necessary expenses and solicitor's fees incurred in the prosecution of the suit, and prayed that it be declared a lien upon the property recovered. The solicitors themselves also,

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made a similar motion. The Chancellor was of opinion that the litigation was a controversy between warring stockholders, and that complainants were not entitled to an allowance for counsel fees against the company, and the motions were accordingly refused. The defendants below abandoned their appeal on the main question, and there is now no controversy in respect to the correctness of the decree rendered in favor of complainants.

Complainants appealed from the decree of the Chancellor refusing a reference on the motion for an allowance of reasonable counsel fees. The first error assigned is, that the Chancellor erred in refusing said motion, for the reason that, no question having been made as to the necessity of the suit to recover and preserve the valuable real and personal property belonging to the Lookout Mountain Company, and the necessity for employing counsel to prosecute the cause, and the recovery inuring to the company, it was a proper case for the allowance of counsel fees.

The second assignment is, that the Chancellor should have decreed that the counsel fees be paid out of the recovery, inasmuch as the suit was brought for the purpose of protecting the property in the first instance, and was prosecuted in good faith to a successful termination; that the recovery inured to the benefit of the corporation—the Lookout Mountain Company—and all of its property was restored to it, and no especial benefits reaped by the complainants.

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The only answer to the claim of complainants for an allowance of their reasonable counsel fees, as we see it in this record, is that the judicial machinery by which these transactions were canceled and the property restored to the corporation was set in motion by minority stockholders. It may be conceded at the outset that if this is the case of an intestine war between discordant stockholders, to promote their individual emolument, and not for the immediate benefit of the corporation, it would not be a proper case for the allowance of counsel fees.

Ordinarily, the directors and other officers of a corporation institute all suits in the name of the corporation, when it is necessary to protect its property rights, and it is only when the officers have breached their trust, and refused to take action, that suits can be instituted by minority stockholders.

It is insisted that this suit was, in reality, the suit of the Lookout Mountain Company, and, the regular trustee having breached his official duty, that the minority stockholders had a right to put the machinery of the law in motion, on behalf of the corporation, and employ counsel to represent it. The insistence is that the recovery in such a case as this belongs to the corporation, and the suit is, in all respects, the same as if the corporation had prosecuted it, except that the stockholders may commence such a case. 3 Pomeroy's Eq. Jur., Sec. 1095.

The reasons adduced by Prof. Pomeroy for the rule allowing minority stockholders to institute such a suit appear to us conclusive on this question. We quote his language, as follows:

"Although the corporation holds all the title, legal or equitable, to the corporate property, and is the immediate *cestui que trust*, under the directors, with respect to such property, and is, theoretically, the only proper party to sue for wrongful dealings with that property, yet Courts of Equity recognize the truth that the stockholders are ultimately the only beneficiaries; that their rights are really, though indirectly, protected by remedies given to the corporation; and that the final object of suits by the corporation is to maintain the interests of the stockholders. While, in general, actions to obtain relief against wrongful dealings with the corporate property by directors and officers must be brought by and in the name of the corporation, yet if in any such case the corporation should refuse to bring suit, the Courts have seen that the stockholders would be without any immediate and certain remedy, unless a modification of the general rule were admitted. To that end, the following modification of the general rule stated in the last preceding paragraph has been established as firmly and surely as the rule itself. Wherever a cause of action exists primarily in behalf of the corporation against directors, officers, and others, for wrongful dealing with corporate property, or wrongful exercise of

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corporate franchises, so that the remedy should regularly be obtained through a suit by and in the name of the corporation, and the corporation either actually or virtually refuses to institute or prosecute such a suit, then, in order to prevent a failure of justice, an action may be brought and maintained by a stockholder or stockholders, either individually or suing on behalf of themselves and all others similarly situated, against the wrongdoing directors, officers, and other persons; but it is absolutely indispensable that the corporation itself should be joined as a party—usually a co-defendant. The *rationale* of this rule should not be misapprehended. The stockholder does not bring such a suit because *his* rights have been *directly* violated, or because the cause of action is *his*, or because *he* is entitled to the relief sought. He is permitted to sue in this manner *simply in order to set in motion the judicial machinery of the Court*. The stockholder, either individually or as the representative of the class, may commence the suit, and may prosecute it to judgment; but in every other respect the action is the ordinary one brought by the corporation. It is maintained directly for the benefit of the corporation, and the final relief, when obtained, belongs to the corporation, and not to the stockholder plaintiff. The corporation is, therefore, an indispensably *necessary* party, not simply on the general principles of equity pleading in order that it may be bound by the decree, but in order that the relief, when granted, may be awarded

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to it as a party to the record by the decree. This view completely answers the objections which are sometimes raised in suits of this class, that the plaintiff has no interest in the subject-matter of the controversy nor in the relief. In fact, the plaintiff has no *direct* interest. The defendant corporation alone has any direct interest. The plaintiff is permitted, notwithstanding his want of interest, to maintain the action solely to prevent an otherwise complete failure of justice." 3 Pomeroy's Equity Jurisprudence, Sec. 1095.

In the case at bar, if the corporation had instituted the suit, it would undoubtedly have been liable for the fees. We think it was such a suit as the corporation ought to have commenced, but the directors and officers having assumed an antagonistic position to the rights of the stockholders, and illegally conveyed away all the corporate property, threatening the entire destruction and dissolution of the corporation, the minority stockholders had a right to intervene, and, by bill in equity, protect the corporate interests. The company was an indispensable party to the suit, and for this reason the decree was not recovered for Grant and the other minority stockholders, but for the corporation. 2 Cook on Stock and Stockholders (3d Ed.), Sec. 748; *Howe v. Barney*, 45 Fed. Rep., 668; *Wallace v. Bank*, 5 Pickle, 635; *Deaderick v. Wilson*, 8 Bax., 131.

In the case of *Mecker v. Winthrop Iron Company*, 17 Fed. Rep., 48 *et seq.*, Baxter, Circuit Judge,

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allowed counsel fees and other necessary expenditures in the prosecution of a suit by minority stockholders, where they succeeded in having a lease of real estate forfeited, and recovered the property for the corporation. In that case the iron company owned an iron ore mine. In 1877 the company leased its mine to a partnership composed of four brothers, known as the St. Clair brothers. These brothers, after effecting the lease, organized the Winthrop Hematite Company to work the mine. In 1881, before the expiration of the lease, an effort was made, but without success, to renew the lease for the hematite company. Thereupon, the St. Clair brothers bought a majority of the stock of the iron company. They organized and manipulated the iron company so as to have a resolution passed, by its directors, directing an eighteen year lease to be made to the hematite company, at lower rates and royalties than the old lease, then about to expire. This lease was accordingly executed. Mecker and other stockholders in the iron company filed their bill to rescind the renewal lease to the hematite company, and for an account of rents and profits. The Court rescinded the lease, and appointed a receiver to take charge of the mines for the iron company. It was held that, as the suit was prosecuted for the benefit of all the parties interested, to protect and preserve a trust-fund, they were entitled to be re-imbursed from the fund for all proper expenditure liabilities incurred. A reference

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was ordered to ascertain what would be a proper allowance for counsel fees and other necessary expenditures.

Upon the authority of this case, Spelling, in his treatise on Corporations, lays down the following rule, viz.: "The owner of stock in a corporation who sues for himself and all other shareholders successfully, for a wrong done to the corporation, is entitled to be re-imbursed his actual and necessary expenses, including attorneys fees, out of the corporate fund." 2 Spelling on Corporations, Sec. 643; Cook on Stock and Stockholders (3d Ed.), Sec. 748, p. 118.

An English case very much in point is that of *Kernaghon v. Williams*, Law Reports, 6 Eq., 228, opinion by Lord Runilly, M. R. See also *Trustees v. Greenough*, 105 U. S., 527; *Central Railroad and Banking Co. v. Pettus*, 113 U. S., 116; *Meddaugh v. Wilson*, 151 U. S., 343.

We are, therefore, of opinion that this record shows that, through the intervention of these minority stockholders, the property of the corporation has been preserved, protected, and, indeed, recovered, after it had been illegally conveyed away, and that such recovery inuring to the benefit of the corporation, the suit was, to all intents and purposes, the suit of the corporation itself. The Lookout Mountain Company is, therefore, responsible for proper and reasonable counsel fees incurred by complainants in the prosecution of the suit. The remaining question is whether these fees are

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liens upon the land conveyed by the deeds which complainants procured to be canceled. The record shows that this land had been conveyed away, and that, by the decree, it was restored to the company, and, if necessary, a writ of possession was ordered to issue. This was not the case merely of canceling a deed or removing a cloud, but of absolute recovery. The case comes within the rule laid down by this Court, that counsel are entitled to a lien upon the fund recovered by their clients for reasonable fees, and this lien attaches to real estate when the subject of litigation. *Perkins v. Perkins*, 9 Heis., 95; 15 Lea, 50; 1 Lea, 29.

We are, therefore, of opinion that these fees must be paid by the Lookout Mountain Company, and that they are liens on the land recovered.

The decree of the Chancellor is reversed, and the case remanded for a reference, in accordance with the motions submitted by complainants and their counsel in the Court below.

Rhodes v. Wood.

RHODES v. WOOD.

(Knoxville. October 25, 1894.)

FRAUDULENT CONVEYANCE. *Burden of proof.*

Where the husband's creditors seek to set aside, as fraudulent, his deed to his wife, upon the averment, which is denied by an unsworn answer, that the recited consideration was fictitious and colorable, the burden is upon the complainants to prove the truth of this averment.

Cases cited: Cox v. Scott, 9 Bax., 305; Yost v. Hudiburg, 2 Lea, 627; Washington v. Ryan, 5 Bax., 626.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.
T. M. McCONNELL, Ch.

CHAMBLISS & CHAMBLISS for Rhodes.

H. B. CASE for Wood.

McALISTER, J. This bill was filed by judgment creditors of the defendant, H. B. Wood, to set aside an alleged fraudulent conveyance from the defendant to his wife, Alice J. Wood. The property conveyed was a lot of household and kitchen furniture. The transfer purports to have been made to pay a pre-existing indebtedness of \$400, due the wife for money borrowed. The bill

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charges there was no consideration for said transfer; that the alleged consideration of \$400 was fictitious, and that the conveyance was a mere device to defraud creditors. Wood and wife, in their answer, deny that the consideration was colorable, but aver that the \$400 was loaned the husband by the wife under an agreement that it should be paid back when demanded. Defendants do not show in their answer when nor how said loan was made, nor from what source the wife derived the \$400 alleged to have been loaned. The only proof filed in the case was taken by the complainants, which consisted simply of a certified copy of the conveyance attacked, and proof to show the character and amount of complainants' debts. The complainants introduced no proof tending to show that said conveyance was fraudulent. The defendants took no proof at all, and the bill waived an answer under oath. At the hearing, the Chancellor dismissed the bill. Complainants appealed, and have assigned errors.

The whole controversy in this Court is in respect to the burden of proof. The insistence of complainants' counsel is that the presumption of law is that the money belonged to the husband, and the wife must show affirmatively that she acquired it in such a manner as to constitute a separate estate; that, in the absence of such proof, the presumption of law that the money belonged to the husband would be controlling. It is admitted that the general rule in Tennessee is to

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the effect that, when a conveyance is attacked, the burden of proof rests on the complainant. But it is insisted that this rule is satisfied in the present case by the presumption of law.

The fallacy of the argument is in the assumption that there is any such presumption of law as the one supposed. We have two cases, in our reports, in which the very reverse of the proposition was announced. In the case of *Cox v. Scott*, 9 Bax., 305, a bill had been filed by a judgment creditor of Scott, and a lot attached in the town of Milan which was claimed by Mrs. Scott, wife of the defendant debtor. The bill charged that the house and lot were sold at a chancery sale, and bid off in the name of Mrs. Scott, but that the entire purchase-price of the lot was paid with the money of the husband, and that this was a fraudulent device to vest the title of the property in the wife, to hinder and delay creditors—the husband being at the time indebted largely and insolvent. The answer of the defendants admitted the purchase of the property, and the vesting of the title in Mrs. Scott, but it denied that any part of the purchase-money paid belonged to Mr. Scott. Mrs. Scott then proceeded in her answer to give an account of the sources from which she derived the money used by her in the purchase.

Judge McFarland, in delivering the opinion of the Court, said: "It is argued upon behalf of complainants * * * that there is no evidence to sustain the statement of the [wife's] answer in

regard to the money used in paying for the property; but in our view [and this is the point of the decision] the *onus* is upon the complainants to overthrow the title of Mrs Scott, and show affirmatively that the property was paid for with the money of the husband," etc.

Now, the criticism made by complainants' counsel upon this case, and the distinction attempted to be drawn between it and the case at bar, is, that in the former case the wife did not confine herself simply to a denial of all fraud, and a bare assertion that the money belonged to her, but that she set out, in her answer, the sources from which she derived her money, thereby making out a *prima facie* case of a separate estate. Complainants' counsel admits that, in such a case, the *onus* would devolve upon complainants to show fraud. But his insistence is, that this rule cannot be applied in a case like this, where no facts are shown in the answer that constitute a separate estate in this money, but the wife simply relies upon a general averment that the money belonged to her; that she loaned it to her husband, and he promised to repay it. We do not think, in the application of the principle, the two cases can be differentiated.

In the case of *Yost v. Hudiburg*, 2 Lea, 627, the same eminent jurist, Judge McFarland, held that the principle was applicable in a case like this. In that case, complainant was a judgment creditor, and filed a bill to subject to the satisfaction of his claim, a house and lot in Knoxville,

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conveyed by William Coffman to Mrs. Hannah Hudiburg, the wife of the defendant debtor. The bill charged that the consideration of the conveyance was the money of the husband debtor, and that the purchase was made by him, but the title taken to the wife, to defraud the creditors of the husband. Answers under oath were waived. The answer of Hudiburg and wife admitted the conveyance of property by William Coffman to Mrs. Hudiburg, but denied that the consideration paid was money or means of said A. S. Hudiburg, and proceeded to give in detail the history of the transaction, by which it was claimed that Mrs. Hudiburg became possessed of the means to pay for the purchase from Coffman.

It appeared that the cause was heard without evidence, except a transcript of the record of complainant's judgment. The question arose in respect to the burden of proof with the record in that condition. Judge McFarland, in disposing of this question, said, viz.: "Had the answer stopped with a simple denial of the allegation that the money or means of A. S. Hudiburg paid for the property purchased from Coffman, the *onus* would have been upon the complainant to prove the allegation." *That* is precisely the state of the pleadings in this case.

It is true, in the former case, the Court held that, the answer having gone further and stated in detail the history of the transaction, the complainant was entitled to the benefit of all admissions,

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and was at liberty to draw any legitimate inference from those statements, even though it be to establish fraud in the face of the general denials of the answer. The Court held "that as the defendant had undertaken to show how Mrs. Hudiburg became possessed of the means, if we can see, from the entire history of the transaction, that it originated in fraud, it will not be allowed to stand, although the other conveyances are not attacked. As the defendants set up these other conveyances, they must show that they are valid and *bona fide*."

It will be observed, in that case, the facts stated in the answer made an exception to the general rule, and cast the burden of proof upon the defendants. But the Court expressly recognized the applicability of the general rule to a case like the one at bar. *Washington v. Ryan*, 5 Bax., 626.

There being, then, no proof whatever that the conveyance from Wood to his wife of this household and kitchen furniture was fraudulent, the decree of the Chancellor is affirmed.

O'CONNOR v. KNOXVILLE HOTEL CO.

(Knoxville. October 27, 1894.)

1. CHANCERY PLEADING AND PRACTICE. *Relief.*

Chancery Courts may grant, under the prayer for general relief, any relief other and different from that specifically indicated and prayed, which is justified by the averments of the bill. (*Post*, pp. 710-717.)

Case cited and approved: *Dodd v. Benthall*, 4 Heis., 608.

2. CORPORATIONS. *Jurisdiction of Courts of Equity to wind up defined.*

Chancery Courts will not entertain suits of minority stockholders to wind up the affairs of a corporation and distribute its assets, upon the averment that they disapprove of the management, or consider the speculation a bad one. Their remedy is to elect new officers or to sell their shares and withdraw. (*Post*, p. 711.)

3. SAME. *Same.*

But, whenever, in the course of events, it appears beyond question that it is impossible to attain the objects for which the corporation was formed, and that failure is inevitable, Chancery Courts will, upon the failure and refusal of the officers and directors of the company to put an end to its operations and wind up its affairs, enjoin, at the suit of stockholders, the use and diversion of the company's property by the majority, and order its affairs to be wound up and its assets distributed among those equitably entitled. (*Post*, pp. 711-713.)

4. SAME. *Same. Case in judgment.*

A stockholder can maintain a bill, filed on behalf of himself and all other stockholders, against the corporation, its officers and directors, to wind up its affairs and distribute its assets, when the complainant avers that the corporation was formed for the purpose of erecting, furnishing, and operating a hotel at a cost of \$200,000; that only \$72,000 had been subscribed, of which part was uncollected and part insolvent, and that no further subscriptions could be had; that, for a period of four years, nothing had been done in the enterprise; that, in the meantime, the tide of business had receded, so that the site purchased was no longer desirable for hotel purposes; that taxes, interest, and expenses are rapidly absorbing the assets, which are entirely un-

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productive, and that debts are pressing, without cash assets to meet them; that, in fine, the original scheme has become utterly impracticable; and that the directors have refused, upon proper application, to call a meeting of the stockholders to take steps to wind up the company's affairs and distribute its assets. (*Post*, pp. 713-717.)

Code construed: § 4168 (M. & V.); § 3431 (T. & S.).

FROM KNOX.

Appeal from Chancery Court of Knox County.
HENRY R. GIBSON, Ch.

TEMPLETON & CATES and WALTER M. COCKE for
O'Connor.

LUCKY & SANFORD for Hotel Association.

WILKES, J. This bill is filed by a single stockholder, on behalf of himself and all other stockholders and creditors who might desire to come in thereunder, against the Knoxville Hotel Association, a corporation in Knoxville, Tenn., and the directors of the same, as well as certain stockholders, by name, and all others who might not choose to join as complainants.

The prayer of the bill is, that it be entertained as a bill to wind up a corporation, the purpose of which has become incapable of accomplishment, and for such other further and different relief as the facts stated in the bill may warrant.

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The corporation directors and stockholders filed separate demurrers, but, in effect, the same. The demurrers were sustained by the Chancellor, and the bill dismissed, from which complainant appealed, and he has assigned as error the action of the Chancellor in sustaining the demurrers and dismissing the bill under the facts stated therein.

In his argument and brief complainant also contends that the corporation has ceased and failed to use its franchises for a number of years; that the object for which the charter was obtained was to erect, keep, and furnish a hotel, and nothing has been done in that direction, except the taking of the subscriptions and buying the property soon after it organized, and this makes a case of non-user in the sense of § 4168 of the Code (M. & V.), and under that section the complainant seeks to have the corporate property applied to the corporate debts, and any surplus divided among the stockholders. It is also argued that while complainant might have had an attachment under that section, still the provision for attachment is merely directory, and not mandatory.

It is also insisted that, although this statute is not referred to in the bill, and non-user is not charged in express terms, still the facts detailed make it one of non-user, and bring the case within the statute, and relief can be had under the general prayer for further or different relief. *Dodd v. Berthal*, 4 Heis., 608; *Story's Equity Pleadings*, Sec. 40.

The general rule applicable to such cases is laid down in the following language by Mr. Morawetz, in his work on Private Corporations:

"If share-holders in a corporation disapprove of the management, or consider their speculation a bad one, their remedy is to elect new officers, or to sell their shares and withdraw. They cannot insist on having the company's business closed, and assets distributed, against the will even of a single stockholder who wishes to have the business continued. It is clear, therefore, that the Courts cannot interfere at their suit, and order the company to be wound up." Morawetz on Corporations (2d Ed.), Sec. 283, and cases cited.

While this is the general rule, the same author states an exception to it, as follows:

"Whenever, in the course of events, it proves impossible to attain the real object for which a corporation was formed, or when the failure of the company has become inevitable, it is the duty of the company's agents to put an end to its operations and wind up its affairs. Under these circumstances, the majority would have no right to continue to use the common property and credit for any other purpose, because it would be impossible to use them for any purpose authorized by the charter. If the majority should attempt to continue the company's operations in violation of the charter, or should refuse a distribution of the assets, any share-holder feeling aggrieved would be entitled to the assistance of the Courts, and a de-

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cree should be made ordering the directors to wind up the company's business, and distribute the assets among those who are equitably entitled." Morawetz on Private Corp., Sec. 284.

And again: "However, before the Courts can thus interfere with the management of a corporation, and order its business to be wound up, it must be shown very plainly that the business cannot possibly be carried on any further without a departure from the company's charter; and a Court of Chancery cannot impair the discretionary powers conferred upon the majority by the charter, and decide on their behalf whether the continuance of the enterprise be advisable as a commercial speculation. The rule was laid down by Lord Cairns, L. J., in the *Suburban Hotel Company's Case*, as follows: 'If it were shown to the Court that the whole substratum of the partnership, the whole of the business which the company was incorporated to carry on, has become impossible, I apprehend the Court might, either under the Act of Parliament or on general principles, order the company to be wound up. But what I am prepared to hold is this, that this Court, and the winding up process of the Court, cannot be used as a means of evoking a judicial decision as to the probable success or non-success of a company as a commercial speculation.'" Morawetz on Corp. (2d Ed.), Sec 285.

Beach on Private Corporations states the rule as follows: "Unless it appears beyond question

that the continuation of a profitable business cannot be had, the dissolution of a corporation not yet insolvent will not be decreed upon the petition of a minority of its stockholders. If, however, it is clear that the business cannot be profitably continued; the petition of a minority for a dissolution will be granted."

Spelling on Private Corporations, Section 100, states, in substance, that the Court would, in case the scheme was impossible, not allow the funds to be diverted to other purposes, but would enjoin such diversion at the suit of a stockholder, and, as incidental, give full relief by decreeing a settlement of the corporate liability and a distribution of the remainder among the stockholders.

As before stated, the cause comes to this Court by appeal, on the part of complainant, from the decree of the Court below sustaining the demurrer and dismissing the bill. We can therefore only look to the allegations of the bill to see whether complainant brings himself within the rules thus laid down. These allegations are taken for confessed upon the demurrer, and the question before us is their sufficiency, and not their truth, which is conceded for the purposes of the demurrer.

The bill alleges the incorporation of the company on April 22, 1889, and the registration of the charter and organization thereunder; that the scheme and purpose of the corporation was the purchase of certain very valuable property in the city of Knoxville, and the erection, maintenance,

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and conduct of a "grand hotel thereon for the greater glory of Knoxville and the renown of her citizens. The best features of all other hotels were to be embraced, and every convenience, comfort, ease, and luxury which experience could suggest or modern invention provide were to be combined to make it a consummately perfect hotel." The bill proceeds:

"In summer its flower-covered roof was to eclipse the hanging gardens of Babylon; in winter its rose-lined inner court was to rival the vale of Cashmere. It was not to depend on ordinary patronage, but was, in its appointments and attractions, to be so irresistible that guests would crowd to it from every point of the compass, winter and summer, in a constant stream of custom and profit.

"Subscriptions were solicited and obtained to the extent of \$72,000. Knox County was induced to let the corporation have its old court-house lot, and did so upon an assurance that, within a reasonable time, a hotel, to cost not less than \$200,000, would be erected thereon, and a deed was made, retaining, however, a lien for the purchase-money, \$8,000 of which was to be paid thirty months after the twenty-fourth of January, 1890. Contemporaneously with the delivery of this deed, a penal bond was executed by the hotel company, well secured by personal indorsement, conditioned to erect the hotel within a reasonable time, and at an expense of not less than \$200,000. Other valuable property contiguous was added, which has all been paid

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for. Complainant sold the corporation a lot for \$8,000, upon the assurance of the company that its plans were perfected upon this scale, and would benefit his contiguous property. One thousand dollars of the amount was paid him in cash, and notes executed for the balance, but, upon repeated appeals to his patriotism and pride as a Knoxville-ian, he surrendered these notes, and took \$2,000 of stock in the company instead."

The bill continues: "The '*Grand Hotel*' has proven 'grand' only as a *failure*. The enterprise was *moribund* from the first. The plan was impracticable in its conception, and is now manifestly incapable of execution. Not a dollar of subscription in addition to the seventy-two thousand dollars has been obtained for four years, and none can now be procured. Twelve thousand dollars to fourteen thousand dollars of the subscriptions already obtained are reported by the treasurer of the corporation as insolvent. Thirty-eight thousand dollars of the amount subscribed have been paid up, thirty-one thousand nine hundred and fifty dollars have been expended, and the balance has been dissipated, and there are virtually no funds in the treasury; the property is yielding no income, and is being consumed in interest on purchase-money, expenses, and taxes; population and business have, to a large extent, left that part of the city, and are daily moving away from the locality, and the site is now on the verge of the city and unsuitable for a hotel site. So that the plan, purpose,

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and scheme of the corporation have become manifestly impossible of performance, and business prudence and the necessity of the case require that the property be sold in lots, the debts of the concern paid, and what remains divided among the stockholders.

"Complainant further states that he applied to the directors to call the stockholders together to discuss the propriety of such action, which request was declined. In the meantime, the county of Knox has directed the purchase-money due it to be collected and the liability on the bond enforced."

These are the allegations of the bill, which, so far as they allege facts, and not inferences or opinions, must be taken as true on demurrer. Stripped of all extravagant expressions, the allegations of the bill are that the scheme was the erection, furnishing, and operating a hotel, at a cost of not less than two hundred thousand dollars, which would benefit all property contiguous or near to it; that only seventy-two thousand dollars has been subscribed, and no further subscriptions can be obtained; that for about four years nothing has been done in the prosecution of the enterprise; that, in the meantime, the tide of business and population has moved away, so as to make the site no longer desirable for hotel purposes; that no more money can be enlisted in the enterprise; that taxes, expenses, and interest charges are absorbing the assets, and that debts are pressing, without cash assets

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to meet them; and that the original scheme is now impossible of consummation.

In such case, it will not do to say that complainant has his remedy to sell out his stock. No man of ordinary business sagacity would buy, except at a sacrifice, under such circumstances, and the only alternative left is to sit still and await future developments that may perhaps change the situation or wind up the business. We think the case made in the bill entitles the complainant to relief, on common law as well as statutory grounds. What different aspect may be put on it by answer and proof we cannot anticipate, but complainant, under his showing, is clearly entitled to an answer and relief, and the decree of the Chancellor is reversed, and cause remanded to be further proceeded in. Appellees will pay costs of appeal.

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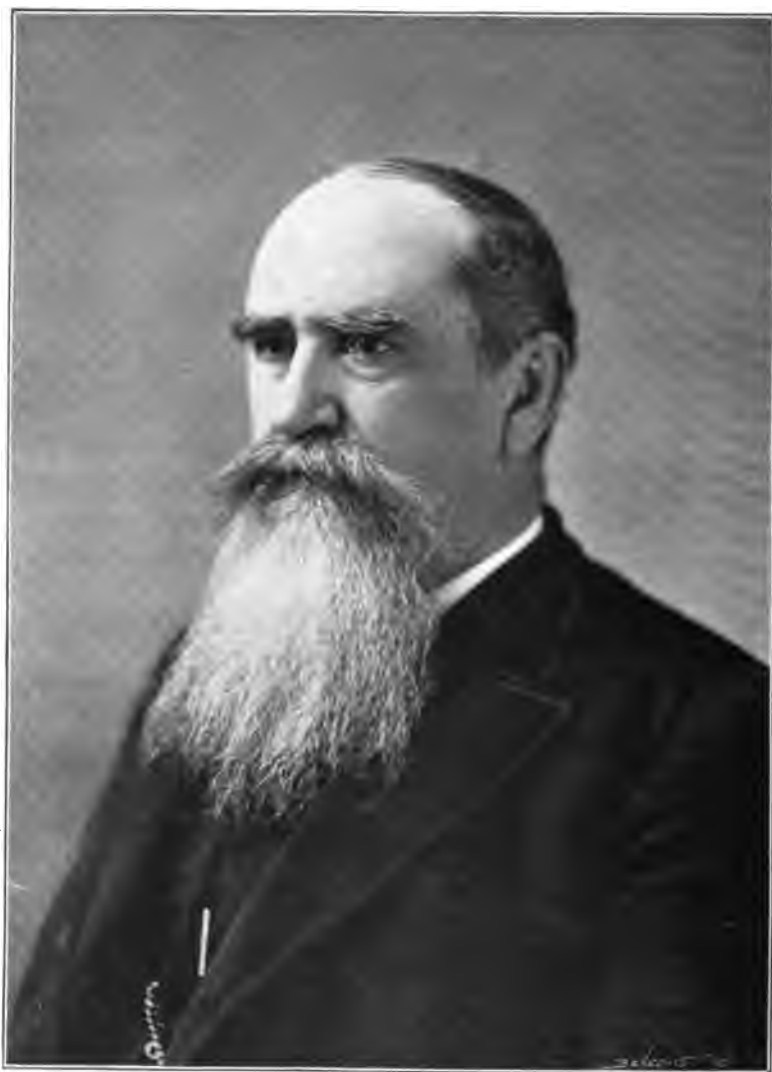
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Ben J. Lee C.J.

HON. B. J. LEA.

At a meeting of the bar of the State, held in the Supreme Court-room, at Jackson, Tenn., on May 11, 1894, for the purpose of taking appropriate action with reference to the death of Hon. Benj. J. Lea, late Chief Justice of the Supreme Court of Tennessee, the Hon. B. M. Estes, of Memphis, was called to the chair, and G. M. Barton, of Memphis, was elected secretary. On motion, the chair appointed the following committee on resolutions: A. D. Bright, chairman; Luke E. Wright, M. M. Neil, C. G. Bond, J. J. Vertrees, S. F. Wilson, H. E. Palmer, W. A. Henderson, G. W. Pickle, and Xenophon Wheeler, after which the meeting adjourned until the twenty-first of May, 1894.

At the meeting on May 21, 1894, the Hon. B. M. Estes presiding, the committee reported the following resolutions, which were unanimously adopted:

BENJAMIN JAMES LEA was born in Caswell County, N. C., January 1, 1833. His ancestry was English and Scotch-Irish. He was the son of Alvis G. Lea and Nancy Lea. His mother was Nancy Kerr, of a very prominent family in North Carolina. He was graduated from Wake Forrest College, North Carolina, in June, 1852, and shortly thereafter removed to Haywood County, Tennessee, where he engaged in teaching school. In the meantime he was preparing himself for admission to the bar as a practicing attorney. In 1856 he was licensed to practice law by Judge John Read

and Chancellor Isaac B. Williams, and at once opened a law office in Brownsville. From 1859 to 1872 he was a law partner with Hon. H. J. Livingston. In 1859 he was elected Representative in the General Assembly of the State from Haywood County, and served in the Legislature of 1859-60, being a member of the Committee on the Judiciary and Federal Relations. While still a member of the Legislature he was appointed, by Governor Isham G. Harris, Commissary, with rank of Major, in the Provisional (Confederate) Army of Tennessee, and a few months later was elected Colonel of the Fifty-second Tennessee Regiment, and remained its Colonel until the close of the war, having been re-elected upon its re-organization by a unanimous vote. He was taken prisoner early in 1865, and kept on parole until the final surrender.

After the war, he returned to his home, and resumed the practice of law, with splendid success. In 1876 he was appointed, by Governor James D. Porter, Special Judge of the Supreme Court, on account of the protracted sickness of Judge Thomas J. Freeman, and served as Special Judge of that Court for about a year. In 1878 he was appointed, by the Supreme Court, Attorney-general and Reporter for the State. This position he held for eight years, and served the State with ability and fidelity. The work of the Supreme Court while he was Attorney-general and Reporter was very heavy, and his reports—sixteen in all, the largest number issued by any Reporter—shows them to be well prepared and ably edited. In 1889 he was elected to the State Senate for the counties of Haywood, Crockett, and Lauderdale, being the first Democrat elected from that Senatorial District since the war. He was elected President of the Senate, which position he filled in a highly creditable manner.

In 1890, upon the death of Judge W. C. Fowlkes, he was nominated and elected to fill out his unexpired term,

receiving the largest majority (over sixty thousand) ever received by any Democrat in the State. In April, 1893, he was elected Chief Justice of the Supreme Court, in place of Chief Justice Lurton, who had been appointed to the Federal bench. Judge Lea, as Chief Justice, was called, under the Constitution of the State, to preside at the impeachment trial of Judge J. J. DuBose, and his impartial rulings, patience, and ability made for him many warm friends.

Judge Lea was married in June, 1853, to Miss Mary C. Currie. This was a most happy union. He leaves a widow and three children—Mrs. J. P. Eastman, of Lebanon, Tenn.; Katie B. Sanders, wife of Hon. John C. Sanders, of Lebanon, Tenn.; and Alvis G. Lea, a son, of Brownsville.

In politics, Judge Lea was a thorough Democrat; in religion, a devout Methodist, supporting the Church and its institutions liberally. He was a member of the Masonic fraternity, filling many positions of honor and trust in this order. He was also a member of the Knights of Honor, Ancient Order of United Workmen, and the Golden Rule.

Judge Lea was a man of marked personal characteristics, a fine specimen of intellectual and physical manhood. As a lawyer, he was successful; as a judge, upright, honest, and efficient. In all the various positions of honor and trust that he was called to fill, no taint or suspicion ever rested upon him. He was a "clean judge." He had a tender sympathy for the young lawyers, and delighted to aid them. In the social circle he was a princely gentleman. In the home circle he showed to the best advantage—kind, loving, affectionate, gentle, ever dispensing elegant hospitality to his friends, true and faithful to his family, to his State, and his God. He was filled with humanity, he was kind and charitable. He possessed that "charity that suffereth long and is kind." On March 15, 1894, at his beautiful home,

surrounded by his weeping family and sorrowing friends,
he passed gently away. He is gone from us forever.

"Comes there back no sound beyond us,
Where the trackless sunbeams call?
Comes there back no wraith of music,
Melting through the crystal walls?

"Comes there back no bird to lisp us
Of the great forevermore,
With a leaf of life unwithered,
Plucked upon the farther shore?

"What shall sorrow say to sorrow,
Like to tears, fall, unsaid?
For as life is to the living,
So is death unto the dead.

"Sympathy shall sit before thee
Seven days mutely on the ground.
Sorrow is a voice too tender
To be drowned by ruder sound."

Therefore, be it resolved, That, in the death of Benjamin J. Lea, the State has lost a faithful servant; the judiciary an able, honest, upright judge; society one of its purest members, and the profession a shining light.

Resolved, That his pure life and the clean record he has left behind him cause us to rejoice that he has lived amongst us, and has left us an example so richly worthy of imitation.

Resolved, That we tender his bereaved widow and children our deepest and heartfelt sympathy.

Resolved, That we request G. W. Pickle, Esq., Attorney-general for the State, to publish these proceedings as an appendix to the next volume of published reports.

Resolved, That our Supreme Court, now in session at

Jackson, Tenn., be and are requested to have these proceedings spread of record upon the minutes of the Court.

A. D. BRIGHT, *Ch'n*;
LUKE E. WRIGHT,
M. M. NEIL,
O. G. BOND,
J. J. VERTREES,
S. F. WILSON,
H. E. PALMER,
G. W. PICKLE,
W. A. HENDERSON,
XENOPHON WHEELER.

The Hon. A. D. Bright, chairman of the committee, in presenting the resolutions, spoke as follows :

Mr. Chairman and Gentlemen of the Bar :

To me this occasion is peculiarly sad. My relations with our deceased brother were most intimate and cordial. To me he had no faults ; from me he kept no secrets ; to me he was all truth, candor, and fidelity. If he had ambition—and he did—it was laudable ; if he sought promotion, it was by clean methods. In me he always found a ready advocate and an earnest promoter. His cause was my cause. He was a “clean judge.” In all his long and useful career as a public servant, no taint of dishonor or suspicion of wrong-doing ever rested upon him. He “was the greatest of all, because he was the servant of all.” He was the friend of the young lawyers. To them he ever extended a helping hand. The sympathy of his great heart went out to them. No sweeter flower will be laid upon his newly-made grave than the tribute of love of the young lawyers of the State have shown his memory. As a judge, he was sound in judgment, honest in conviction, and impartial in his decision. But he lies in the silent grave.

“Silence on the pallid face-cloth,
Silence on the snowy grave;
Silence on the sleeping city,
Silence far below the wave.
Silence, as of music slumbering
On her harp within the deep;
Sound is but the dream of silence—
Silence talking in its sleep.”

On the fifteenth of March last, surrounded by his weeping and sorrowing friends, “he fell asleep, and was not, for God had taken him.” His was a beautiful character—beautiful in life, beautiful in death. In that beautiful land, the far-away home of the soul, he shall dwell forever.

The meeting appointed Hon. G. W. Pickle to present the resolutions to the Supreme Court, who, on presenting same, spoke as follows:

May it please the Court:

I desire to present to the Court this morning the resolutions adopted at a meeting of the bar of the State, expressing their sentiments touching the death and character of the late Chief Justice of this Court. These resolutions commemorate the life and character of one of the purest men that ever sat upon this bench, or presided over its deliberations. It was my good fortune to have known Judge Lea and enjoy his friendship for nearly a quarter of a century, and I speak of him, therefore, from intimate personal acquaintance. Whether viewed as a citizen performing the humble but honorable duties of a private station, or as a lawyer in pursuit of the honors and emoluments of his profession, or as the representative of his people in the halls of legislation, or as the Attorney-general of the State ministering at this bar, or as a Justice and the Chief Justice of this Court, Judge Lea

was always the same admirable person. He was, in every station, the same just, humane, conscientious, and ruggedly honest man. He adorned every station that he filled. As a citizen, he was exemplary; as a lawyer, he was fair and courteous to the Court and to opposing counsel; as a legislator, he added to ability and knowledge the rarer virtues of integrity, disinterestedness, and patriotism; as Attorney-general, he did not, in his abhorrence of crime and zeal for conviction, trample upon the rights of the prisoner or forget the claims of justice and humanity; as a Judge, he was independent and incorruptible, knowing the right and daring to do it, and, in so far as it was compatible with the duties of his great office, tempering justice with mercy.

If Judge Lea had ambition, it was of the nobler sort. He did not, with the arts of the demagogue, court that transient popularity that is won without merit and lost without a crime, but sought rather to deserve that lasting and grateful applause which is paid by the good of after ages as a tribute to eminent virtue.

His life had no stain. He left a name that will be remembered with pride by his family and friends; a name that will adorn the pages of the history of his State; and, better than all, a name that the unfortunate will not think of as of an enemy's.

As from this eminence beyond his grave I look back over the beneficent life of this good man, I think of no one who could, with greater propriety, have repeated Ben Adhem's request, "Write me as one that loves his fellow-men."

That such a life may not be lost; that its memory may be perpetuated and held up for the instruction and imitation of those who shall live after him, I move your Honors that these resolutions be spread upon the record-book of this Court.

And may I not add that I can wish your Honors no happier lot than that he who shall hereafter perform

for each of you the sad office that I have to-day performed for the illustrious dead, may speak in your praise as justly and sincerely as I have spoken to-day in praise of Judge Lea.

After some appropriate remarks made by the Chief Justice and other members of the Court, and different members of the bar, the Court directed the resolutions spread of record upon the minutes of the Court. The meeting then adjourned *sine die*.

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